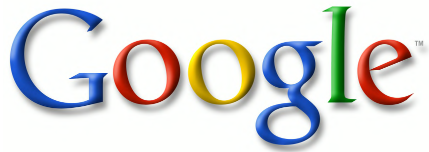

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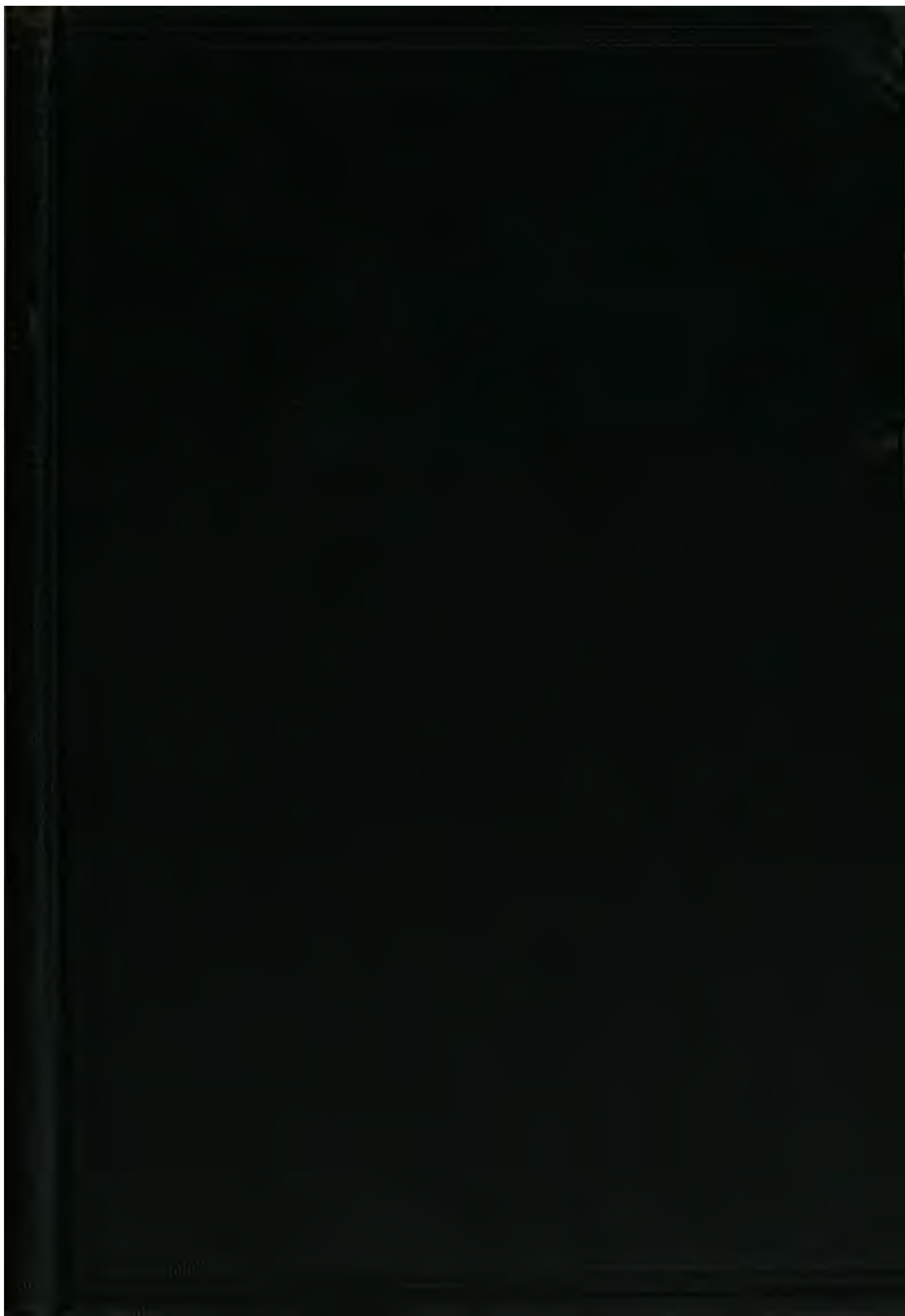

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Publishers New York

173 B

NATIONAL MUNICIPAL LEAGUE SERIES

EXCESS CONDEMNATION

BY

ROBERT EUGENE CUSHMAN
INSTRUCTOR IN POLITICAL SCIENCE
UNIVERSITY OF ILLINOIS

NEW YORK AND LONDON
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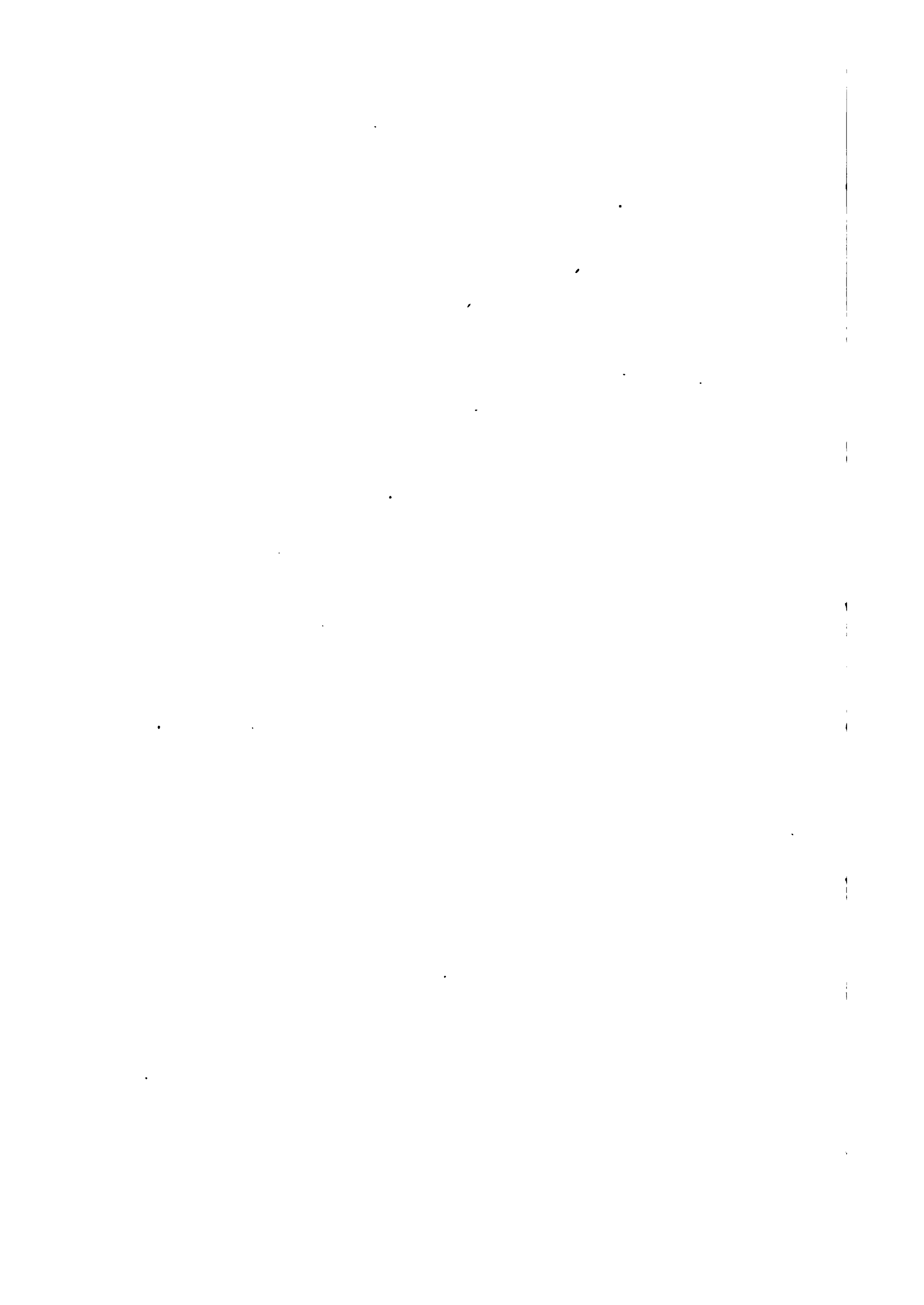

PREFACE

There are several angles from which the subject of excess condemnation may be approached. To the city planner it offers a possible means for controlling the physical development of a city; to students of municipal finance it presents a method of paying for public improvements; for the constitutional lawyer it raises interesting and difficult problems in the law of eminent domain. As a result excess condemnation has attracted, in the main, only the casual attention of those interested primarily in other questions. In the following chapters an attempt has been made to present a well rounded and independent study of excess condemnation which does not ignore the many problems with which it is intimately connected and which also affords a broad view of the purposes for which it may be used and the numerous questions connected with its theory and practice.

It ought to be said that excess condemnation is here treated from the standpoint of the American city. Such a limitation in the scope of the study seemed, in the first place, wise because of the great length to which the discussion must otherwise have been extended; but also it seemed necessary because the first-hand investigation in Europe which would be essential for any adequate treatment of its operation in foreign cities was interrupted by the outbreak of the European war. Such discussion of the experience of European cities with the policy of excess condemnation as appears in the following chapters does not purport to be an exhaustive study. It is intro-

duced merely for illustrative and comparative purposes.

One who penetrates into a field of study so nearly untouched as this one would be exceedingly reluctant to advance theories and programs which must be subjected to the tests of subsequent experience and research, were it not for the fact that in doing so it may be his privilege to open discussion and invite criticism which may help to clarify public thinking upon an important question of the day. It is hoped that the opinions and proposals which are tentatively put forth in this volume may serve this useful purpose.

The responsibility for any errors or inadequacies which may appear in the pages of this study rests upon the author alone. He may not, however, fail to acknowledge his indebtedness to friends and colleagues who have made helpful suggestions, to numerous public officials who have generously answered his inquiries, and particularly to Professor Howard L. McBain of Columbia University for guidance and direction throughout the entire preparation of the study.

ROBERT E. CUSHMAN.

University of Illinois,
Urbana, Illinois.

EDITOR'S INTRODUCTION

The building of cities has taken on new importance in recent years, not only as a physical problem of arrangement, but as one of social control, economic development, and finance. Gradually municipal students, and city administrators and legislators, are coming to realize that it is at once a science and a matter of constructive statesmanship. Two of the volumes already published in the National Municipal League Series deal with the subject — Dr. Nolen's with its broader aspects and Mr. Bird's with its relation to the small communities. The present volume by Dr. Cushman takes up what may be regarded as a detail — a most important one, however, as it involves in a high degree all of the several phases: physical, social, economic and financial. It is because of this fact that it has been deemed advisable to devote a single volume to what to some may seem like a narrow subject. Moreover, there is no work in the English language on the subject, and the publishers have agreed with the editor of the Series as to the necessity for the presentation of an adequate treatment at this time.

Dr. Cushman, the author of the book, has devoted three years to a careful study of European and American experience. He was in Berlin on this errand at the time the great European War broke out. Although the latter handicapped him to some extent, he had already gathered sufficient material to enable him to make an authorita-

tive presentation of the theory and practice of excess condemnation.

It is the belief of the editor of the Series that this pioneer volume will prove in time to be one of the big and determining contributions to the development of American cities along progressive, social and financial lines. An abundance of references adds to the practical value of the book, which has been written with both the theorist and the practical man of affairs in mind.

CLINTON ROGERS WOODRUFF.

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EXCESS CONDEMNATION

CHAPTER I

THE THEORY OF EXCESS CONDEMNATION

THERE are several reasons why it is still perfectly respectable to be completely ignorant about excess condemnation even though it is almost one hundred years old. In the first place, the policy of government to which this not very illuminating title is applied is indigenous to European countries. Only in Great Britain, France and Belgium has it passed beyond the experimental stage. Then, too, the name "excess condemnation" is a fairly recent American term. The European, therefore, while he may be familiar with the policy itself, may not recognize it by its American name. And in the United States, not only are the term and the policy which it denotes of recent origin, but also the attempts to employ excess condemnation, or even to legalize it, have been confined to relatively few places. Outside these places there is little interest in the scheme and little knowledge regarding it, save upon the part of a few city officials and city planning experts. It is only very slowly that the term "excess condemnation" is coming to convey even a vague idea to the layman.

To make this policy still more hazy, the term "excess condemnation" is far from being self-explanatory. Neither in theory nor in practice is the policy which it denotes simple and clean-cut. It is always a complex

policy, multifarious in the forms in which it appears and the purposes for which it is employed. One may speak, therefore, of excess condemnation and still be under the necessity of explaining in detail which of several forms of excess condemnation one has in mind.

Yet it is possible to frame a definition of excess condemnation that will cover its essential characteristics. Defined thus generally, excess condemnation may be said to be the policy, on the part of the state or city, of taking by right of eminent domain more property than is actually necessary for the creation of a public improvement, and of subsequently selling or leasing this surplus. In a certain sense it is superfluous to state that the surplus property may be disposed of by the state or city, because if this were not done there would be no possible motive for taking the excess and the scheme would never be put into operation. Furthermore, if the city were unable to sell or lease the surplus property it would be obliged to hold it or use it and it is doubtful if land so held or used by the city could be said to be condemned "in excess" of need. The essence of the policy of excess condemnation is, then, the condemning, by the government, of more property than is actually needed.

There are two elements in excess condemnation which are worthy of consideration. It is worth noting, in the first place, that this policy involves the right of the public authorities to condemn property. In 1911 the legislature of Wisconsin passed a law permitting the board of land commissioners of any city of the first class "to acquire, in the name of such city, lands and improvements thereon in any manner by purchase, lease, contract or gift, within 1000 feet of any existing or contemplated public park or parkway, and to sell, mortgage, lease or

contract for the sale of the same in any manner. . . ."[1] This law has sometimes been referred to as an excess condemnation statute. In reality it provides only for excess purchase, and no authority is given by its provisions to take private property without the consent of the owner. In certain other states laws have been enacted by which cities may be compelled to purchase the whole of a man's estate if part has been taken by eminent domain and he does not wish to keep the remainder.[2] But here again, although property is taken in excess of actual public need the excess property is not condemned but purchased. Unless the surplus land is taken by eminent domain, the taking cannot be accurately called excess condemnation.

In the second place, excess condemnation involves the taking of private property "in excess"; that is to say, in excess of what is used for making the improvement. It is not necessary at this point to enter into a discussion of the various purposes for which the American law of eminent domain permits the taking of private property by the public. It is sufficient to note that, prior to the recent enactment of excess condemnation statutes, the state or city has customarily condemned property only when all the property so taken was actually to be used by the public for such purposes as highways, parks or sites for public buildings. Excess condemnation involves a taking by eminent domain of property which is not used for any of these ordinary purposes and which will lie completely outside the lines of the street or park which is being created or improved.

Perhaps this second essential element of excess condemnation may be made more clear by distinguishing

[1] Laws of Wisconsin, (1911), Ch. 558, Sec. 2.
[2] See *infra*, p. 49.

between that policy and a somewhat similar exercise of the power of eminent domain. Cities and states, both in this country and abroad, have frequently condemned private property for the purpose of reclaiming land which was before unusable, or for the purpose of clearing out insanitary slum areas. Some forty years ago the state of Massachusetts began the work of reclaiming the so-called Back Bay Flats, low land over which the tides from Boston Harbor ebbed and flowed. These lands were utterly unusable and their condition prevented the efficient use and development of that portion of the harbor. The state adopted the most simple and direct plan for accomplishing the work when it acquired title to this whole area by right of eminent domain. The lands were properly drained and protected and the natural result was a large increase in their value. The sale of a large portion of the district resulted consequently in a handsome profit to the state.[3] In several instances other states have enacted laws making it possible to carry through similar undertakings.[4]

In England and Scotland a like policy has been followed as a means of solving the housing problem. Certain acts of Parliament permit cities under the direction of the local government board, to condemn an entire slum area. The city may then tear down the insanitary tenements and either erect workmen's cottages which it may rent, or sell the land to private parties who are bound to erect workmen's dwellings.[5]

[3] Moore *vs.* Sanford, 151 Massachusetts, 285 (1890). Statutes of 1869, Ch. 446; 1875, Ch. 239; 1884, Ch. 290. The court upheld the project as constitutional. The profit made by the state was declared to be purely incidental to the main purpose of the undertaking.

[4] See for example: South Carolina Civil Code, Ch. 48, Art. 9 (1909); Massachusetts Laws of 1913, Chs. 543, 759, 767.

[5] Housing of Working Classes Act (1890), 53 and 54 Vict., Ch.

Some writers are inclined to regard these rehabilitation schemes as examples of excess condemnation.[6] And perhaps in a very strict sense it may be said that there is in such a project a condemning of property in excess of what the city actually needs for the completion of the improvement. It is possible that the state or city might have accomplished this reclamation and rehousing work by acquiring merely certain easements or rights in the property which was to be improved. From that point of view it might be urged that when the city went beyond the taking of easements and condemned title to the land itself, thus using a right of condemnation greater than was absolutely necessary for the purposes of the improvement, it was condemning property in excess of what was needed and the project was, therefore, an example of excess condemnation.

Such a doctrine would unduly broaden the meaning of the term excess condemnation. It would bring within its scope every case in which the public authorities, in seeking to accomplish a definite public object, take, in the exercise of their discretion, greater property rights than are indispensably necessary for that purpose. There is,

70, which has been amended and expanded by the acts of 1893, 1894, 1896, 1900, 1903 and 1909.

In 1915 the following amendment to the constitution was adopted in Massachusetts: "The general court shall have power to authorize the commonwealth to take land and to hold, improve, subdivide, build upon and sell the same, and to do any other lawful act in relation thereto, for the purposes of relieving congestion of population and providing homes for citizens: provided however, this amendment shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof." This power has not as yet been utilized.

[6] Mr. Herbert S. Swan, who prepared a report on excess condemnation for the Committee on Taxation of the city of New York, has incorporated into his monograph a chapter on "The Clearance of Insanitary Areas in Scotland."

for example, certainly no exercise of excess condemnation where a city, in opening a street, takes the fee in the land, instead of following the more usual system of condemning an easement merely; and yet it is difficult to see how this differs in principle from the taking in the reclamation cases. The better view would seem to be that land is condemned in excess only when it is taken for a definite purpose other than the actual creation of the public improvement which the city has undertaken. It is taken for a supplementary purpose and one which is quite separable. The surplus land is not condemned as a means of producing the public work in connection with which it is acquired because, although it may be acquired for some related purpose, it is not necessary to the creation of that work that it be taken at all. Under this interpretation it is not easy to see any real element of excess condemnation in the projects of re-housing and reclamation which have been mentioned. In these instances, the taking of the land itself rather than merely easements in that land is a direct and expedient method of making the desired improvement, and all the property rights thus acquired are by fair and reasonable construction necessary for that purpose. For this reason, any detailed examination of these undertakings is excluded from this study as being irrelevant to the main problem under consideration.

The discussion of the general nature of excess condemnation, contained in the foregoing paragraphs, presents a somewhat vague and indefinite notion of the genus to which this interesting policy belongs. There are many species, and they vary greatly in the numerous and complex provisions through which the general principle is transformed into an actual working program. In the main, however, the character of these variations will

depend upon the purpose for which excess condemnation is being employed; for it is this purpose which will determine the amount of surplus land to be condemned, how long it will be held by the city, and under what conditions it will be sold or leased. A brief examination of the purposes for which the scheme may be used will give a clearer idea of the principal forms in which excess condemnation has thus far made its appearance.

The first purpose for which excess condemnation was used in the United States was to solve the problem of lot remnants. When an old street is widened, or a new street cut through which is diagonal to the boundary lines of the abutting lots, it usually happens that fragments of land remain, often odd-shaped and of such size and character as to be practically unusable in the condition in which they are left. To leave these remnants awkwardly fringing the lines of the improvement is injurious both to the nearby property owners and to the city itself; and yet, for reasons which are presented in a later chapter, abutting owners are unable to work out any satisfactory remedy for such a condition. Now in no sense are these left-over bits of land necessary to the city for the purpose of constructing the improvement. Some states, however, have allowed their cities to condemn such remnants just as though they were essential to the building of the highway; after the improvement is completed the city disposes of these remainders. It usually sells them to the adjoining owners, who are thus enabled to replot their land so as to absorb the remnants and increase the usefulness and attractiveness of the entire tract.

The second purpose for which excess condemnation is employed is for the protection of the beauty and use-

fulness of public improvements. A city contemplates the construction of a beautiful park or boulevard. How can it be sure that the beauty of the place will not be marred or destroyed by an unsightly fringe of shanties or, worse still, by a line of billboards screaming forth the virtues of patent medicines or tobacco? Here excess condemnation comes to the rescue. Instead of taking by eminent domain just enough land to make the park or boulevard, the city condemns also the land on either side of the improvement back to a distance of perhaps one hundred or two hundred feet. After the improvement is finished, the city sells the surplus land it has acquired; but it writes into the deeds of sale restrictions which will prevent the use of the property for purposes which would be detrimental to the beauty, light, air and usefulness of the park or pleasure drive. The city has not only created a place of beauty, it has protected that place forever from anything which, in the opinion of the authorities, might mar or disfigure it or impair its usefulness.

A third purpose for which excess condemnation has frequently been used, especially in Europe, is for the making of money. Assume that a city finds it necessary, in order to secure proper transportation facilities, to open a new street through a portion of its territory already built up. The proposed highway is primarily for the purposes of utility, the appearance of the abutting property being a secondary consideration. Yet the cost of acquiring the land actually necessary for the new street is so great as to be well-nigh prohibitive. Assume, furthermore, that the city has the power of excess condemnation. It may then condemn not merely the land actually needed for the highway itself, but a liberal belt on either side. As soon as a valuable thoroughfare is

constructed, this property becomes at once more desirable and its value rises; whereupon the city sells this surplus land, not at the price at which it was acquired by condemnation based upon its former valuation, but at the higher price due to its enhanced value. The profit, which thus comes to the city instead of to former owners or to real estate brokers, goes far toward meeting the cost of the improvement, and in some instances has netted the city a tidy surplus. The city has, in short, intercepted a portion of the increment of value created by the expenditure of its own money.

These are the three purposes for which excess condemnation has thus far been utilized. Sometimes all of these purposes have been merged in the same project, sometimes they have been pursued singly. And even within these three groups the variations in policy and detail have been exceedingly numerous. In the following chapters these three main types of excess condemnation will be analyzed in some detail in the light of actual experience.

A clear understanding of the essential nature of excess condemnation necessarily brings with it an appreciation of the fact that such a policy involves a rather high degree of social control. It provides for a somewhat drastic invasion of private property rights for the benefit of the whole community. It is but natural, therefore, that there should be many in this country who condemn excess condemnation with great bitterness, who condemn it not because of the many administrative problems it presents for solution, not because of the serious constitutional questions which are raised regarding it, but because they look upon it as fundamentally unsound in theory. To them it seems an unwarranted interference, on the part of the government, with the property

rights of the citizen. They call in question the principle of excess condemnation and declare it unsound.

To determine whether excess condemnation is sound or vicious in theory is to face the same problem which is presented by almost every new piece of social legislation. There is the same balancing of privileges and obligations. On the one hand there is the ancient and sacred right of the citizen to continue undisturbed in the possession and enjoyment of his property, except where he is dispossessed for the accomplishment of an unquestionably public purpose. On the other hand are the more general conveniences of society as a whole, the furnishing of which may be a public purpose only in a broad definition of community needs, and not at all in the narrow traditional sense of indispensability. Which of the two should control? It is a question easy to ask and hard to answer; not hard, perhaps, for this man or that man to answer, but hard to answer in such a way as to convince the majority. What seems to one person the grossest invasion of sacred private rights seems to another merely the obvious and necessary protection of community interests. In last analysis, the difference between legitimate social control and confiscation is a difference only in degree. And whether one condemns a piece of social legislation or regards it as necessary and beneficial depends not only upon the accuracy and penetration with which one balances private rights over against public welfare in any concrete instance, but also upon the degree to which one's social and economic viewpoint is dominated by an individualistic or communistic philosophy. This is the reason why the same problems of social control receive different solutions in different countries. In Europe, where the scheme has been rather widely used, the theory of

excess condemnation seems to have called forth small comment and less objection. It has remained for Americans, only gradually being weaned from a *laissez faire* doctrine of governmental action, to regard the principle of excess condemnation frequently with suspicion and sometimes with disfavor.

Whether or not excess condemnation can be regarded as a justifiable measure of social control will depend in large measure upon the purpose for which it is employed. Certain it is, that the taking of surplus property in order to eradicate the evil of remnants of land, or in order to protect the beauty and usefulness of a public improvement, can be defended upon somewhat different principles from those which support the use of the scheme for the single purpose of making money for the city. The use of excess condemnation to control remnants and its use to protect improvements are, in a certain sense, similar in theory. In either case the additional land taken by the city is acquired for a purpose very closely allied with that of the main project under construction. If it is proper for a city to create a park or a boulevard in order to enhance the beauty of the district and promote the health and pleasure of its citizens, it is argued that it ought also to have the right to take such measures as will prevent the beauty and usefulness of those improvements from being impaired or destroyed, either by the continued existence of unsightly and unusable fragments of land or by the uncontrolled disfigurement of the abutting property. The taking of the surplus land for subsequent sale or lease under restrictions directly promotes a purpose of the same kind as does the taking of the land which the public will actually use. There are few who will deny that by such excess condemnation of property the city is seeking to do some-

thing, to accomplish an end which only the most outworn theories of social control, or freedom from social control, would regard as illegitimate. To declare that a city may properly make a large and expensive improvement but may not use adequate means to secure to its citizens the fullest use and enjoyment of that improvement is to rival the narrow individualists of a century ago.

While one may approve, however, of the beneficent ends which these two types of excess condemnation aim to accomplish, one does not necessarily admit that excess condemnation is the only nor even the best way of carrying out those purposes. If the welfare of the community requires that the state or city exercise control for a public purpose, it is reasonable to demand first, that that control be efficient and adequate, and second, that it be so exercised as to involve as small an interference as possible with individual freedom of action and the rights of private property. And this is precisely the ground on which the use of excess condemnation for the solution of the remnant problem and for the protection of public improvements is bitterly attacked. To protect the usefulness of a street or the beauty of a park is one thing; to do it in the manner which is most drastic, and works most serious hardships, inconvenience and deprivation to the individual citizens whose interests are involved, is quite another. There are less drastic means, it is alleged, by which the city could accomplish the same purpose. It could, for example, condemn merely an easement in the property abutting on an improvement, paying a fair price for the right to impose upon the owner of that property such restrictions as to the use of it as would adequately protect the improvement itself from disfigurement or other

injury. But instead of this simple and relatively inoffensive method of accomplishing this salutary purpose, it is proposed to use excess condemnation: deprive the abutting owner of his property, oust him from any share in the direct enhancement of the value of that property, compel him to seek at much inconvenience a new location, and then, adding insult to injury, perhaps sell the land thus taken from him to his business rival. Such a policy, claim the opponents of excess condemnation, involves an unwarranted and unnecessary subversion of private rights. Certainly, it is fundamentally unsound in principle for a city or state to resort to a needless interference with the rights of its citizens. The crux of the matter is, then, is it a needless interference?

The issue between the advocates and opponents of excess condemnation for the purpose of thus protecting public improvements narrows down, then, to this: is it reasonably necessary to resort to the use of this policy in order adequately to accomplish the end in view? The city may properly employ such methods as are the most effective to achieve a legitimate end, and it is not obliged to refrain from using means which are the most direct and efficient because there are other more inadequate and roundabout but less drastic methods also available. The question to decide is, whether or not excess condemnation is so much better adapted to secure the object for which the city is striving as to warrant the more vigorous invasion of private property rights which it involves, as against the other methods, particularly the condemning of an easement, which might be used. As was suggested before, it is a question of degree: is the efficiency gained through this particular policy of furthering public improvements for the general welfare more than worth the sacrifice of the freedom from dis-

turbance in the enjoyment of private property rights which it involves? It is a question which will never be settled to the satisfaction of every one. It is a question which cannot be answered at all by a resort to theory and speculation, but only by an intelligent comparison of the actual working of excess condemnation with that of the rival schemes proposed by its opponents.

Excess condemnation for purposes of making money for the city or state involves a principle radically different from excess condemnation used for the purpose of securing adequate protection to public improvements. Here the city condemns private property for the purpose of financial gain. There need be no restrictions placed upon the use to which the surplus land may be put when the city parts with it. That property may be covered with grotesque and hideous structures or crowded with skyscrapers or tenements. The usual words of the statutes embodying this type of excess condemnation are that the surplus land may be leased or sold "with or without suitable restrictions." That is to say, if the imposition of suitable restrictions seems likely to endanger the profitable disposition of the excess land, the city is quite at liberty to dispose of that land without imposing those restrictions. It cannot therefore be declared that the excess land condemned under this liberal policy is taken for any public purpose directly connected with the creation or protection of the improvement. Excess condemnation, when used as a purely financial expedient, cannot be defended upon the principle which justified it in the foregoing instances — that it merely involves the taking of private property for a purpose intimately related to the larger project under construction.

It might, of course, be urged that this surplus land

is appropriated for a purpose incidental to that of the main improvement, since it is resorted to in order to lessen the cost to the city of the entire undertaking, and to lessen it merely by taking part of the value which the money of the city has created. But on the other hand if the city may condemn land in excess solely because it needs the money which it hopes to make from the resale of the land, where, it may well be asked, is the land which the city may not properly take for such a purpose? While the property of every citizen may be taxed for the purpose of securing public revenue, it has never yet been suggested, in this country, that an empty treasury could justify the public authorities in depriving a man of his property by right of eminent domain.

No serious attempt has ever been made to defend the use of excess condemnation for financial purposes upon such a flimsy ground as that just mentioned. The policy rests, instead, upon the underlying principle that it is a direct and effective method of intercepting a portion of that increment of value which the city, by its own enterprise and money, creates. In other words, when the city condemns land in excess and makes a profit from the resale of such land it does not, it is asserted, take from the private citizen, because it needs it, something which belongs to him; it merely adopts the most effective plan for preventing that private citizen from taking for his own use a money value which the public has itself produced by the expenditure of its own money, and which, therefore, does not by any sound theory of justice belong to him. In the apt phrase of a well-known student of the problem,

> The state says: " We, the state, purpose to spend taxpayers' money upon your land, as a result of which a certain portion

of your land which is not required for the particular work in hand will be greatly benefited in value. This benefit will not be an unearned increment, but, on the contrary, it will be an earned increment. That earning will not be your earning, but an earning by money paid by taxpayers. We propose that they who sow shall reap and that the taxpayers' money having produced the increment, the taxpayers shall receive the return, through the state." . . . In the case of excess condemnation nothing is taken from the individual for which he is not paid. He is paid well, and, in fact, overpaid in the majority of cases of condemnation of land for any purpose. There is taken from him, without return, the hope of an increase that may come through the expenditure of the public's money.[7]

It is unnecessary, for the purposes of this study, to discuss the social justice of securing to the public as large a portion as possible of the increment of value created by public improvements. The United States has probably done as little as any civilized country to see to it that the state or city shall retain even a part of this increase in value. And yet there are not many who are prepared to deny the essential soundness of the principle that those who create value by an expenditure of effort and money have the fairest claim to the enjoyment of that value, and that this holds true not only of private persons but of states and cities.

There are many students of social and economic problems who feel that the public is entitled to a share, at least, of the so-called unearned increment of land value caused not by any definite public enterprise but by the normal growth and expansion of the community. Far stronger than this is the right of the city or state to

[7] Andrew Wright Crawford, in the *Proceedings of the Second National Conference on City Planning,* 1910, pp. 155–156.

take the increment of value which it definitely earns by the outlay of public money in public improvements.

While there may be little dispute as to the right of the public to enjoy the profit or recoupment which it is the aim of excess condemnation to secure, there is, however, wide difference of opinion as to whether excess condemnation is the fairest method of acquiring that profit for the city. Its opponents attack it as an illegitimate means of doing a legitimate thing. The same general objection, in fact, is made to the use of excess condemnation as a profit-making scheme as was urged against it when used for the purpose of protecting public improvements. The objection is that, as a method designed to accomplish effectively the highly salutary aim in view, excess condemnation interferes with the rights of property owners unjustifiably and wantonly, since it goes very far beyond what is reasonably necessary. Every citizen is entitled to freedom from such interference with his liberty and property as is not fairly demanded by the paramount interests of the whole community. If there are other methods available by which the same purpose can be carried out effectively and which are less subversive of individual rights and privileges, it is impossible to justify, upon any sound theory, the use of so drastic a measure as excess condemnation.

There are at least two important methods besides excess condemnation by which the city may secure some portion, at least, of the increment of value resulting from the construction of public improvements. The first of these is the familiar system of levying special assessments or betterment taxes. A special assessment is a payment for benefit received. When the city undertakes an improvement which definitely and immediately bene-

fits the property of the adjacent owners, it assesses upon such property, in proportion to the benefit received, a part of the cost of the work. This is the well-established plan by which most American cities pay at least a portion of the cost of making and improving their streets and sometimes their parks. Frequently these special assessments are levied only upon property which immediately fronts upon the improvement. There is no reason, however, from the standpoint of theory, why any property, regardless of its location, which can be shown to be measurably benefited by the public work should not be assessed its proper share of the cost. In some cities this has been done, but in general our municipalities have levied these assessments rather conservatively. It is unquestionably true that, almost everywhere, this method of turning back to the public treasury a portion of the value which the public creates by its improvement could be used more effectively than at present.

An important limitation, however, is imposed upon the levying of special assessments, and it is because of this that those who urge excess condemnation as a financial expedient regard it as a halfway measure. By almost universal statutory limitation and well established practice, the city is not allowed to levy special assessments beyond the total cost of making the improvement.[8] Usually an even smaller amount is secured, for

[8] It would perhaps be going too far to call this limitation a fundamental rule of law. Statements are found, both in Cooley and in "Cyc," that an assessment should be limited to the cost of the improvement, and that property owners would have the right to demand the return *pro rata* of any sums collected in excess of such cost. *Cooley on Taxation*, p. 1263; 28 "Cyc," 1155. The cases cited in support of this statement involve, however, the interpretation of statutes authorizing the levying of assessments in order to meet the cost of improvements. In such a case the limitation is purely statutory. No case appears in which a city has made a

in many states the law does not permit the assessing of the entire cost of the improvement upon the specially benefited property owners. But nowhere, so far as can be discovered, does the city make a money profit by this method. The property owner therefore pays back to the city, not the amount of the accretion in the value of his property nor any fixed proportion thereof, but a certain proportion of the money cost of constructing the improvement. The city does not attempt to do any more than break even on its undertaking. It is easy to see, therefore, that under our modern system of special assessments the city does not secure all of the profit or increment of value which, by the expenditure of public money, it has created and to which in pure theory it is fairly entitled. All profit over and above the cost of construction, profit which the city might hope to obtain by a judicious use of excess condemnation, is discarded by the very nature of the special assessment system. While it will be of interest later on to view this policy more closely, it is enough to observe here that by reason of the limitation referred to it differs essentially from excess condemnation, and from the standpoint of theory, at least, it can hardly be regarded as a successful competitor of that policy.

There is another method of securing the increment of value which the city earns by making public improvements, and this method is not subject to any such limitation as that imposed upon the levying of special assessments. It is a type of increment tax. It is not a policy

deliberate attempt to assess the full amount of the benefits accruing to private property in order to make a profit for the city over and above the cost of the improvement. The restriction of assessments to costs is so well established and so universal in application, however, that it may be regarded as a characteristic feature of the American system of special assessments.

with which American cities have had experience, but it has been used in several of the countries of Europe. It is similar to the special assessment in that it may be collected from those whose property has been measurably increased in value by a public improvement. It differs from a special assessment in that the amount of the charge is limited, not by the cost of making the improvement but by the amount of money benefit which accrues to private property. While it has been customary, in the places where this tax has been levied, to collect only a certain percentage of the increase in value, there seems to be no reason, in theory, why the city or state need stop at that point. It is conceivable that every dollar of value created by the expenditure of public money could, by the effective imposition of such a tax, be recovered back into the public treasury. The practical problems connected with the assessing and collecting of such a tax need not concern us here; but it is a scheme which, in principle at least, gives to the city as much of the increment of value fairly belonging to it as does excess condemnation: namely, all of it.

There is a considerable difference, however, in the extent to which the increment tax and excess condemnation affect the rights and privileges of private citizens. It is at this point, of course, that the bitterest attack is made by the opponents of excess condemnation. The increment tax, it is asserted, compels the property owner to give over to the city that which the city has earned and can fairly claim. He loses nothing that was ever his. He is merely prevented from enjoying an expected benefit which never belonged to him and which he had no more share in producing than any other member of the community. He is in the position of a man who had hoped that a rich relative would bequeath him a sum of

money and was disappointed. He is certainly no worse off than he was before. The city, morever, has received on behalf of the taxpayers all that the taxpayers' money has been able to earn. Under excess condemnation, on the other hand, the city gains nothing which the increment tax could not give to it. This is assuming, of course, that excess condemnation is employed for the sole purpose of financial gain. By condemning surplus land and reselling or leasing it, it is apparent, by the simple process of subtraction, that the city gains the amount by which the value of this surplus land has increased. It could not, in the nature of the case, gain more than that. The citizen whose property is thus condemned, as in the case of the increment tax, is barred from the enjoyment of an increment of value which the city, and not he, created, and of this he cannot justly complain. But in addition to this he does lose something which was his before. He loses possession of his particular piece of property. He loses his location in the neighborhood or business district. He may have no absolute assurance that he can ever recover it. The city acquires full title to his land. It may subsequently dispose of it by private contract or auction, but may be under no obligation to sell it back to him. He may be obliged to go elsewhere, to buy or build, and at great inconvenience, not measurable always in money damages, to reëstablish himself in a new location. He may even be obliged to move to such a distance that he will derive only the most remote and most theoretical benefit from the public improvement which has caused his misfortune. He may be worse off than he was before; and all because he was unlucky enough to own property the value of which happened to be increased by an improvement which may have been made quite against his

wishes. The city does not content itself with seeing that he does not enjoy an increase in the value of his property — it penalizes him for being the owner of that property. The city says to him, "We must be sure that you get nothing from your land which you did not earn and which we did earn, and, in order to make sure of that, we will take that land of yours away from you and, if necessary, we will sell it to some one else." Here, it is urged, is an unnecessary invasion of the sacred rights of private property which it is impossible to defend or justify.

There is no denying the cogency of this argument, if the premises are admitted. If it is true that the increment tax can be utilized as efficiently as excess condemnation, and with as adequate results, to secure the profit which is justly due to the city or state, then it is difficult to see how the added interference with private rights which excess condemnation involves can be defended or excused. But this is an assumption which the advocates of excess condemnation do not accept. They regard the policy of excess condemnation as the most effective and certain method of securing the increment of value which belongs to the city. The inconvenience and loss which must be borne by property owners in the execution of such a scheme are fully justified by the added benefit to the community of using the most practical and adequate method for the accomplishment of the aim in view. And so this controversy also hinges upon the practical working efficiency of the two plans, a balancing of public convenience over against private inconvenience.

In the foregoing pages it has been brought out that excess condemnation is employed for the accomplishment of different purposes — the eradication of the evil of

land remnants, the protection of public improvements from disfigurement and injury, the securing to the public of the value actually created by the use of the public's money. It has been evident, however, that in the accomplishment of these aims there may be a choice of means; and that to say that the city ought to protect public improvements or intercept the increment of value created by its public works, is very far from saying that it ought to employ excess condemnation as a means to those ends. One is obliged to conclude that whether excess condemnation is the fairest and wisest method of carrying out these purposes will depend upon how much more efficient, if any, it is, in actual operation, than the rival schemes which involve a less drastic invasion of private rights. The following chapters attempt to analyze the actual operation of excess condemnation, with a view to determining its advantages and disadvantages as a working program, and its actual value as a means of accomplishing the purposes for which it is designed.

CHAPTER II

EXCESS CONDEMNATION AND THE PROBLEM OF REMNANTS OF LAND

THE general nature of the problem of remnants of land has already been sketched in broad terms.[1] The evil of lot remnants is a very old evil, and furthermore it is one which bids fair to persist even in spite of the wisest of preventive measures. It is true that remnants are left in a vast number of cases simply because a city planned its streets badly or failed to plan them at all; but it is equally true that many street openings and widenings which leave a fringe of useless fragments of land in their wake are necessitated by developments in the growth of the city that no human intelligence could have foretold when those highways were laid out. For one or the other of these reasons, there is scarcely a city in the land some of the streets of which are not marred by these unsightly left-overs. There is certainly no gainsaying the very general prevalence of the evil of remnants of land and the pressing character of the problem of what to do with them.

There are two ways in which remnants of land may be caused in the construction of a public improvement. The first of these is by widening an existing highway or public place, or by opening a new street running closely parallel to the lines of an old one. Ordinarily city real estate is plotted in a sort of checkerboard fashion,

[1] *Supra*, p. 7.

so that each owner has a square or rectangle of land. This means, of course, that the boundary lines which separate the plots of land abutting on the same street will lie at right angles to the street line. Obviously, a widening of the street will not change this condition, and there is not much danger, therefore, that such an improvement will leave odd-shaped fragments of land scattered here and there along its length. In fact, it frequently happens that an old street may be widened without leaving any fragments of land which are not readily usable. This is quite likely to be the case when the widening is moderate in scope and the amount of new land used for the purpose is taken equally from the property on both sides of the street. In some instances, however, the widening is extreme or conditions demand that all the land necessary to it be taken from one side of the street. In crowded districts, where the individual lots are not very deep, this may easily result in leaving the abutting owners with plots of land as wide as they were before, but only a few feet in depth. In other words, the newly widened street may be skirted along its entire length on one side, or even on both sides, by a strip of land, still parceled out to separate owners, which is so shallow as to be perfectly useless for any purpose except the erection of billboards or a fence.

This is precisely what happened not long ago in connection with an important project in the city of New York. In order to make a suitable approach for the Williamsburg Bridge over the East River, it was found necessary to widen Delancey Street and open a continuation of it, west of the Bowery, which is now known as Kenmare Street. When this improvement had been completed it was found that the newly improved highway was skirted for a distance of many rods by strips

of land not more than ten feet deep and in some instances with an average depth of less than one foot. The owners of these useless remnants were not only quite unable longer to enjoy the substantial privileges of an abutting owner on the street, but could prevent anybody else from enjoying those privileges.[2] It is unnecessary to multiply examples of situations of this kind. It is apparent that they may arise anywhere in connection with the construction of many kinds of useful improvements. Remnants of this character may not, it is true, be created so frequently as those which arise in other ways, but when they do occur they are likely to close in around the street or public place with an appalling completeness, and their effect upon the interests of every one is doubly devastating.

Usually, however, remnants of land are created in a slightly different manner, although their general effect may be similar to that which has just been described. In the checkerboard system of streets and private lots so common in our American cities, it is obvious that a new highway cannot be opened diagonally through

[2] Cited by Herbert S. Swan in *Excess Condemnation — A Report of the Committee on Taxation of the City of New York,* along with several other interesting instances of the same thing, compiled from the records of the Department of Taxes and Assessments of New York City, pp. 13–14.

A striking example of this sort of land remnant was recently left in a Pacific coast city. A project of street widening and straightening was worked out, and resulted in leaving a newly opened section of street separated from an old street, parallel thereto, by a remnant of land just wide enough to allow the brick wall of a two story building 142 feet in length to remain standing. The wall was promptly utilized for billboard advertising. It is doubtless the purpose of the city ultimately to close the old street, but in the meantime this unsightly remnant remains. This example is cited by Charles K. Mohler in an interesting article on "Excess Condemnation and City Planning," *Engineering News,* 1916, Vol. 76, pp. 20–22.

a plotted section without transforming the plots of land through which it passes from rectangles and squares into odd-shaped polygons, and without leaving in its wake small wedge-shaped fragments. Sometimes these remnants are so small as to be entirely useless; in other cases they are fit only for uses which mar the beauty of their surroundings and impair the usefulness of the whole district. They may not, and usually do not, front the entire length of the highway in an unbroken line, but loom up at frequent intervals, unsightly hindrances to its proper development. In the cities of Germany considerable care is taken, when streets are opened or land is replotted, to keep in view as much as possible the old lines of private plots, so that the remnants left may be as few and as little hurtful as possible; but even such careful attention does not suffice adequately to solve this vexing problem.[3] As a general rule in this country, however, no such precautions are taken and as a consequence the evil is prevalent here in its most aggravated form.[4]

The injury resulting from these remnants of land is easily apparent. There are, in fact, four different ways in which the continued and uncontrolled existence of

[3] Kissan, B. W., *Report on Town Planning Enactments in Germany,* Par. 7.

[4] In opening some of the sections of Fairmount Parkway, the city of Philadelphia has, in several instances, made a distinct jog in the lines of the parkway so as to include in it some of these little triangles which, if left outside, would have been unsightly remnants. These fragments were thus taken as a part of the parkway, and not as remnants, and they are being maintained as parked spaces. This is shown clearly on the plan of Fairmount Parkway, in the *24th Annual Report of the City Parks Association of Philadelphia,* 1912. While this means of dealing with lot remnants might be used to a limited extent in opening parks or boulevards, it could not adequately meet the problem where it is most acute, namely, in the opening or widening of streets in congested districts.

these fragments is detrimental to public and private interests.

In the first place, these remnants are a menace to the public welfare since they tend to defeat the purpose for which the improvement which caused them was made, and actually obstruct the development of the neighboring property. The fact that they are unsightly and usually unadapted for any legitimate use not only makes them undesirable to own, but makes the property around them less desirable to own. The man who is left, after a street widening, with a plot of land having a frontage of sixty feet and a depth of five feet, cannot use that land himself, cannot secure any benefit from the improvement of the street, and, at the same time, he is so situated that his neighbor in the rear, who ought normally to be an abutting owner on the line of the improvement, is completely shut off from any participation in the value of the improvement. He does not even have access to it. Furthermore, a man who is planning to invest his money in a fine home or place of business is anxious to locate in a district where there are suitable neighbors and attractive physical surroundings. He wishes to live where there are other fine homes or where other high-grade business houses have been erected. When a highway is opened and numerous remnants of land are left along its length, the kind of abutting property owners which it was aimed to attract, and which are necessary in order properly to develop it, will be exceedingly reluctant to locate on it as long as they are unprotected from the type of neighbors and surroundings which these fragments so frequently attract. The result is that less desirable buildings are gradually erected, and the thoroughfare, more or less unsightly in appearance and marred by frequent eyesores, acquires

the reputation of being a relatively low-grade street. The city finds that its outlay of money, instead of resulting in the development of a high-class residence or business thoroughfare, has produced merely another of the motley, nondescript and thoroughly unattractive streets which are the despair of every person having an appreciation of civic beauty.

The second injury resulting from remnants of land is the natural outgrowth of the first — a definite financial loss to the city. In the first place, when the city condemns part of a man's lot and leaves an unusable remainder, it does not as a rule get all that it pays for. In actual practice the compensation which the city pays, in most cases of this kind, is equal to the value of the entire parcel.[5] Viewed from the standpoint of the owner, who is left with a worthless fragment of land or building on his hands, this is fair enough. The city, however, although it pays for the whole lot, takes only the part it uses. This, in itself, is bad bargaining. In the second place, the city usually seeks to pay at least part of the cost of the improvement by special assessments, and here the existence of the remnant presents a real difficulty. It is a well-established rule of law that an owner is entitled to compensation for the injury to the remainder of a lot from which a piece is taken and that such damages may be set off against benefits sought to be assessed.[6] It may be, therefore, that these damages will cancel or even exceed any assessments which might be levied on a remnant. Furthermore the remnant, destroying as it does some of the benefits which would otherwise accrue

[5] Mr. Lawson Purdy, president of the Board of Commissioners of Taxes and Assessment of New York City, states that this is very apt to occur in such cases of condemnation in New York City.

[6] Nichols, *The Power of Eminent Domain,* pp. 269, 276.

to the adjoining property, will have a distinct tendency to reduce the amount which the city might normally assess to such property. But this is not all. When these remnants result, as has been shown, in preventing the development of the surrounding district and causing it ultimately to be less attractive and desirable, the city loses a considerable portion of what it would otherwise have gained in increased taxes. The city probably contemplated a marked increase in the assessable value of the land and buildings in the district caused by the creation of a valuable improvement. It finds, instead, that land values are held down almost to the original mark, as a result of the remnants of land. It is thus unable to recoup to itself any considerable portion of the cost of the improvement out of the expected increase in the tax duplicate. It is probably true that the city seldom pays out more money when it condemns part of a man's land than it would if it took it all; but in face of the fact that it frequently pays quite as much, and at the same time, by leaving a remainder, definitely diminishes its ability to recoup the cost of the improvement, it is fair to say that remnants of land may prove to be a source of actual money loss to the city.

It is not the city alone, however, that is a material loser through the evil of land remnants. The owner of property adjacent to the improvement suffers quite as severely. The man who owns the remnant is often in a sorry plight. He has left on his hands a parcel of real estate which he cannot use efficiently, which he may not be able to sell profitably. He may be required to pay special assessments on an improvement from which he has been and will always be unable to reap any substantial benefit. As a rule, he cannot realize on the increased value which accrues to the land. The damages he re-

ceives may indeed cancel his assessments, but he is left with a well-nigh worthless fragment of land which he cannot use satisfactorily and which, in all probability, he cannot sell unless his immediate neighbors are disposed to buy, since the fragment he still owns usually has value or potential value only because it is capable of being absorbed into the adjoining estates.

But the owner of the remnant is no worse off than his neighbor. Here is a man with a large and desirable lot adjacent to the new or improved street, who finds himself shut off from it by this fragment of land. His property is denied the normal increase in value due to the improvement because of this unfortunate mutilation of his neighbor's plot. He has been obliged to pay heavy assessments to defray the cost of the improvement. He has received no damages, since the blighting presence of an adjoining remnant is not held to be a direct and measurable damage. And yet the benefits which have been assessed to him have been substantially offset or destroyed by the undesirability of his surroundings. He not only suffers direct money loss in this way, but he is also precluded from making the most effective use of his property. There are instances in the city of New York where important street improvements have been completed for more than five years and where the adequate development of the street has not yet begun; where the abutting owners, hedged in by unsightly remnants, can put their property to no better use than they could before the improvement was made. Sometimes a street opening or widening is made for the purpose of transforming a poorer class residence district into a business district. The existence of remnants, in a case like this, retards the development of the street, so that the abutting owner may find his property much less desirable for resi-

dence purposes than it was before, but not as yet desirable for business purposes. The street has ceased to be a residence street, it has not yet become a business thoroughfare; it is merely nondescript. The owner is worse off than he was before. He has paid the bill in special assessments; he has not reaped the benefit.[7]

The fourth evil which results from remnants of land has already been hinted at. It is an evil which injures both the city and the owner of private property. It is the almost inevitable ugliness of these misshapen fragments. The harm done is perhaps not measurable in dollars and cents, but it is none the less serious. No passer-by can be unaware of its blighting effect. It is as though the drawing-room floor in a beautiful home remained constantly covered with the refuse left by the builders. Remnants of land are the shavings and the litter of city planning, and unless the city can sweep them up and dispose of them, they will mar the beauty of their surroundings. There may be nothing inherently unsightly about a small triangle of land, but it is hideously inappropriate to a street fronted with residences or business houses. Remnants of land not only are out of place, they always look out of place. They lend themselves, moreover, to the most unsightly uses to which real estate

[7] The author is indebted to Mr. Lawson Purdy, President of the Board of Commissioners of Taxes and Assessments of New York City, for a striking illustration in support of this statement. In 1897 Lafayette Street near Brooklyn Bridge was widened 20 feet. This left a remnant on the block running north from the corner of Canal and Lafayette Streets which was 91 feet, 7 inches long and 1 foot, 5 inches by 13 feet, 8 inches deep. A lot which adjoined this remnant but faced on Canal Street, a lot 97 feet by 23 feet, was thus prevented from abutting upon the new thoroughfare. The remnant was not merged with this lot by private sale until 1911, but the owner of the Canal Street parcel was assessed $2,626.72 for a benefit which he did not actually enjoy for fourteen years.

can possibly be put. It is unnecessary to elaborate these uses at any length. Refuse can be dumped or billboards erected upon almost any plot of land, regardless of its size or shape; while hardly less objectionable are the one-story "stands" and shanties which are so frequently erected upon such fragments. Of course, it is natural enough that remnants of land should be put to these objectionable uses. In fact, the uglier they are the more easily and more profitably may their owners be able to sell them. There have been numerous cases where the owner of a remnant of land has used it in the most objectionable way in order that he might extort from his outraged neighbors, by this pseudo-blackmail, a price far in excess of its actual value. Remnants of land are unsightly enough at their very best; under such circumstances they become intolerable.

To review, then, the indictment which may be framed against remnants of land in connection with city improvements: such fragments seriously interfere with the effective development of the property adjacent to a public improvement, and tend thereby to defeat the purpose for which the city has undertaken the project; they result in a definite money loss to the municipality through the increase in damages to private property and the depressing of land values; they are a source of loss both to those who own them and to those who own property near them, and prevent both classes of owners from effectively using their property or enjoying the full benefit of the improvement for the cost of which they are assessed; finally, remnants of land are by their very nature ugly and almost any use to which they can be put makes them more so.

It is quite natural, therefore, that a number of methods should have been devised from time to time to solve a

problem so general and so acute as this one. Before discussing excess condemnation as a means of dealing with remnants of land, it will be worth while to consider the other methods suggested to accomplish the same purpose.

The first method is that of replotting the property abutting on an improvement so as to do away with the remnants, and to accomplish this replotting through the voluntary coöperation of the interested owners. Under our present laws, this is the only solution of the remnant problem which is possible in most of the cities of this country; and in theory this plan has much to commend it. In theory, by private sale or purchase the boundary lines of the individual abutting properties are readjusted so that all unsightly and useless scraps of land are united to the adjoining plots. All disputes are amicably adjusted and there is no need for coercion. This method is in reality a settling of a somewhat ominous controversy "out of court," as it were.

It would be going too far to say that the replotting of remnants of land by the voluntary coöperation of the owners involved is impossible of actual accomplishment. There are three or four states in Germany where this plan has been used for many years with some success. This is true in Prussia, Saxony, Bavaria and Hamburg. In some instances, this coöperation seems to have been entirely voluntary. In Bavaria, however, the building police, who seem there to enjoy wide discretionary power, have often exerted a strong pressure toward inducing land owners to coöperate in replotting by their refusal to issue permits for the erection of buildings upon odd-shaped lots. In Hamburg the city itself has acquired by purchase a large amount of land in the city. If an area needs replotting or redistributing and the owners decline to coöperate to that end, the refusal of the city to develop

the nearby land which it owns has in some cases resulted in bringing the recalcitrant owners to time and inducing them either to redistribute their property or to sell it. The general history of German city-planning legislation, however, would seem to indicate that a successful solution of the problem of replotting remnants of land through the voluntary action of the owners is the exception rather than the rule.[8]

This method of dealing with land remnants in the very nature of the case can never be depended upon as a practical and efficient solution of the problem. There are three reasons why this is true. The first of these reasons is that in order to make such a scheme successful it is vitally necessary that there be coöperation amongst all the owners, and such coöperation is usually well-nigh impossible to get. An amicable agreement must be reached amongst a group of people of all kinds, actuated by a wide variety of motives, interests and desires. Each one is anxious to protect his own interests and to secure for himself as large a share as possible of the benefit to be derived from the improvement. Some of the owners are willing neither to buy nor to sell; others will buy but will not sell; while still others will sell but will not buy. Even when the problem of getting buyers and sellers together has been solved there still remains the vexed question of price. The man who owns an undesirable remnant feels that sooner or later his neighbor will be willing to meet his price in order to get rid of him; while his neighbor is disposed to hold out until the remnant owner, discouraged by waiting, will sell at a low figure. There is plenty of room for hard feeling, long delay and final disagreement. Often there are other practical diffi-

[8] Kissan, B. W., *Report on Town Planning Enactments in Germany*, Pars. 7 (i), 85, 93, 107, 112.

culties which stand in the way of securing the needed coöperation from some of the interested property owners. A serious problem is presented when these owners are minors, mortgagees or absent owners. It sometimes occurs that it is well-nigh impossible to discover who the owner of a piece of property is, and when that fact is discovered there remains the task of making him see the advisability of selling a piece of property which he may never have seen. It is quite apparent that the coöperation necessary to make possible this voluntary replotting of remnants is not an easy thing to secure.

The second practical difficulty with this plan is that the owner of certain lands which must be sold in order to secure a wise readjustment of boundary lines may be legally incapacitated to sell. It is possible that all the interested parties might be willing and anxious to make the necessary purchases and sales, but if the owner of a certain estate which must change hands is unable to pass title to his land the whole project of replotting may be thwarted.[9] Or the owner may be bankrupt and the law may prevent the passing of valid title to the land. Thus a man may not be able to coöperate with his neighbors even if he wishes to. The fact that this occurs perhaps very infrequently does not make it less devastating when it does occur.

A third practical objection to this plan rests in the delay, cost and many technicalities which are inevitable when so many individual parcels of private property change hands. This, however, is a matter relatively unimportant and would not of course be a very vital defect

[9] It is unnecessary to discuss at length the many ways in which a man may be prevented from passing title to his property. He may have only a life estate in it, it may be held in trust, or it may be tied up by the terms of an executory devise which would prevent the passing of title save upon certain specified contingencies.

in the plan if it were in other ways an effective and satisfactory scheme. It is quite apparent, however, that to depend upon the voluntary coöperation of landowners to effect a satisfactory replotting of remnants of land is to leave the problem without adequate solution, for only in the rarest and most uncertain instances can such a method be depended upon to produce results.

There is a second plan which has been suggested as a solution of the problem of land remnants, which is not widely different from the one just considered. This is a plan to bring about a replotting of the land through voluntary action on the part of the owners, coupled with suggestion and assistance on the part of the government. It has already been suggested that in certain of the German states the city exerts an influence in the direction of bringing about a private redistribution of land remnants by declining to allow the erection of buildings on odd-shaped lots, and by adopting a policy in regard to the development of its own land which will work toward that end. This latter is a somewhat indirect influence, however, which is exercised rather informally. In England, the efforts which the government makes to induce private owners to coöperate in a replotting scheme are more vigorous and direct than those of the German states, although in the last analysis they may be no more effective. The action taken by the English authorities for this purpose is authorized by a section of the famous Town Planning Act of 1909, which provides that the local government board shall make provision, among other things, " for securing the coöperation on the part of the local authority with the owners and other persons interested in the land proposed to be included in the scheme, at every stage of the proceedings, by means of conferences and such other means as may be provided

by regulations." [10] In other words, the municipal authorities take the initiative in calling a meeting of interested owners, suggest the mutual advantages accruing from a friendly readjustment of boundary lines, and see fair play while the various controversies incident to that readjustment are being settled. The city does not compel any man to buy or sell. It merely suggests. It points out why replotting would be wise, how it would benefit the public and coincide with the best interests of many private owners. It creates an opportunity for amicable discussion.

Reason and experience both support the view that much more can be accomplished in this way than is possible without such help from the public authorities. The action which the city takes goes far to allay the suspicion with which the neighboring landowners are prone to regard each other. The conferences are not called or presided over by any one who has an ax to grind. The broader interests of the city at large are represented and the property owners come to feel that they are rendering a public spirited service to the community as well as protecting their individual interests. The conditions are made ripe for as generous a measure of compromise and friendly agreement as in the nature of the case could be possible, and redistributions are made which could never be effected if left solely to private initiative and individual dickering. Mr. J. S. Nettleford, the eminent English town-planning authority, regards this provision of the Town Planning Act of 1909, for securing redistribution of boundaries through the coöperation of the owners, as one of the most valuable parts of the entire law. He describes, in considerable detail, several projects in connection with which elaborate readjustments of bound-

[10] Town Planning Act of 1909, Sec. 56, No. 2(a).

aries were made by the mutual friendly agreement of the interested owners at the suggestion and under the guidance of the municipal authorities.[11]

As a method of dealing with remnants of land this plan of securing private coöperation through government assistance is good as far as it goes. It does not, however, afford a thoroughgoing and adequate solution of the problem. Its limitations are obvious and are inherent in the scheme itself. If friendly coöperation can be secured, well and good; but when coöperation is for any reason impossible, such a plan is, of course, perfectly useless. To depend entirely upon voluntary action is to be quite unprepared for crises which are sooner or later bound to occur. No method of dealing with remnants of land can be really effective if its successful operation can be blocked by the stubbornness or whim of a single property owner.

A third solution applied to the land remnant problem is one which has been worked out by some of the more progressive states and cities of Germany. It is a plan by which the public authority steps in and redistributes among the various owners the unsightly or unusable remnants of land which need replotting. The care and skill with which this scheme has been developed in Germany are indicative of the acuteness of the need in that country for an effective policy of replotting. The problem there is very old and has its origin in a cause somewhat different from the conditions which obtain in the United States. The parcels of land which need replotting are not exclusively, nor even primarily, remnants or remainders. They are plots which, for perhaps hundreds of years, have been divided up into curiously shaped strips and segments, suitable perhaps for the garden of the German

[11] Nettleford, J. S., *Practical Town Planning*, pp. 47–53.

peasant but not adapted to any urban purpose. It was to secure a satisfactory replotting of these strips of land that the German authorities devised this scheme of redistribution, and while the situation it was designed to meet was thus somewhat different from our own problem of lot remnants it is nevertheless sufficiently analogous to warrant a brief consideration of that method of replotting.

The best known example of this plan of land redistribution is that embodied in the provisions of the famous *Lex Adickes,* a law bearing the name of its author, the eminent *Oberbürgermeister* of Frankfurt am Main. This act was passed by the Prussian *Landtag* in 1902 after there had been ten years of agitation for it.[12] It was amended in some particulars in 1907. Baden and Saxony have legislation of a very similar nature;[13] but only in Frankfurt, for which the *Lex Adickes* was first passed though it has later been extended in Prussia, has such

[12] Gesetz, betreffend die Umlegung von Grundstücken in Frankfurt a. M. July 28, 1902; Gesetz-Sammlung für die Königlichen Preussischen Staaten, 1902, Nos. 10386–10387. A law similar to the *Lex Adickes* but one applying primarily to the redistribution of remnants in agricultural districts was passed as early as 1872. By it the General Commissions of Prussia, which have charge of agricultural affairs, may redistribute unsuitable plots on consent of the owners of approximately half the area, and up to 1895 three-fifths of the total area of Prussia had been so treated. But the fact that the act exempts from redistribution cultivated or built-on lands unless the consent of all the owners is given, makes the act practically inapplicable to the problem of urban replotting. While the General Commissions have occasionally undertaken the redistribution of urban land, their legal right to do so is a matter of doubt. Kissan, *op. cit.,* Pars. 17, 19, 31, 33.

[13] Law of Baden, July 6, 1896; Law of Saxony, July 1, 1900. For discussion of these laws, see Kissan, *op. cit.,* Pars. 65–108; also Appendix E. I., Report of the London Traffic Branch of the Board of Trade, *House of Commons Sessional Papers,* 1908, Vol. 93, p. 165ff, discussion by W. H. Dawson.

legislation been put to any adequate test. There are some variations in the provisions of these compulsory replotting laws, but they all follow in their main provisions the general lines of the *Lex Adickes,* which will, accordingly, be taken as the basis of this discussion. According to this act, a scheme for redistribution may be proposed, either by the municipality or by over half the property owners to be affected provided these owners own over half the property which will be involved in the scheme. After the detailed plan for redistribution is drawn up and those interested in it have had an opportunity to file objections, it must receive the sanction of the administrative authorities of the central government before work is begun. Part of the plan of replotting involves the laying out of new streets and there is no uniform policy of payment for the land needed for them. In some cases the city must pay for all the land thus taken for public use. The *Lex Adickes* provides that when the city proposes a redistribution the city need not pay for land taken for streets unless such land exceeds 35 per cent of the total area being replotted, but must pay for any land taken in excess of that amount. When the proposal for redistribution is made by the property owners, this proportion is increased to 40 per cent. After the streets are laid out the rest of the land in the area is pooled and replotted so as to make suitable building sites. A man loses his original holding, but he receives in return a plot in the same district of proportionate area to the land he pooled, and as near as possible to his original holdings; in the event that this new holding represents a lower value than his original holdings a man is entitled to damages, which are borne by all the owners proportionately. Under the *Lex Adickes,* when an individual holding is so small in area that the newly allotted

plot corresponding to it would be unsuitable for building purposes, and a merging of land cannot be effected among the owners concerned, the city must buy the plot and can sell it to an adjoining owner if he cares to purchase. In 1913 it was proposed to make it obligatory upon the city to sell to an adjoining owner, on his demand, such remnants as it could not merge with its own land. In Frankfurt, the cost of the entire proceedings, administrative and legal, may be borne by the city in case it proposes the redistribution, by the property owners if they initiated it; there are other states in which these costs are shared by the city and property owners according to some ratio fixed by law.[14]

No action was taken by the city of Frankfurt under the *Lex Adickes* until 1909. Since that time two redistribution projects have been completed and four others begun. The first of these undertakings involved an area of thirty-two acres comprising sixty-eight separate holdings. The proposal was made by forty-one owners who held three-fifths of the entire area to be replotted. The city took for streets land amounting to 35.4 per cent of the area of the district involved. The legal and administrative costs of the proceeding totaled 5,400 marks, and this the city paid instead of charging it to the owners because it felt that it was wise to encourage, as much as possible, the use of the law. In fact, the only cost borne by the property owners was the sum of 650 marks paid in damages to the owner of certain unusable lands which had to be taken by the city. The project was completed in 1911.

[14] Kissan, B. W., *op. cit.*, Par. 34. The Baden and Saxony laws differ from the *Lex Adickes* materially in this respect, that the pooled area is to be redistributed according to value and not area. But these provisions have never been tried out, and much doubt exists as to the equity and practicability of this provision. Kissan, *op. cit.*, Pars. 72, 77, 84, 85.

The second case of replotting in Frankfurt was carried out on a somewhat larger scale. One hundred and forty individual holdings with a total area of fifty-one acres were included in the scheme. The city needed for streets and public places only 31.08 per cent of the land involved. Rather heavy damages were paid, however, and the total charges borne by the owners amounted to 62,500 marks, while the cost to the city of carrying out the undertaking was 7,000 marks.[15]

This German legislation involves a rather unique approach to the problem of remnants of land. In a sense, however, it differs from the two plans which have been described only in degree. In the first plan, the property owners themselves redistributed their land. In the second plan, the government suggested and encouraged such voluntary redistribution and assisted in its accomplishment. Under the German method, the government itself does the replotting and hands back to the original owners a proportionate share of the land. This scheme has some striking advantages over other methods of redistributing land. It is a direct and effective policy which cannot be blocked by the stubbornness of one or two recalcitrant owners. The rights of property owners involved are duly safeguarded. Instead of depriving a man permanently of his property and his location, this plan allows him to retain a plot proportionate to his original holding near his former site. If this plot is so small as to be useless, he is afforded an opportunity to sell to the city at a reasonable price. From the standpoint of the public, this method is fair and economical. The city is not obliged, as a general rule, to pay for any land so long as the amount needed for streets and public places does not exceed a third of the total area. Land not de-

[15] Kissan, B. W., *op. cit.,* Pars. 39–52.

signed for definite public use is taken by the city only in exceptional cases in which it must subsequently be disposed of and there is no speculative risk involved. And finally, when the interested owners propose a redistribution, the city is not obliged to pay even the actual cost of proceedings.

It must be borne in mind, however, that the problem of replotting land which the German city faces is not precisely the same as that which confronts the English or American municipality. It is seldom that it is necessary or advisable in this country to readjust all the boundary lines in a particular district. The *Lex Adickes* is admirably designed to convert numerous peasant garden patches and fields into city building lots but it would not meet so well the problem of the remnants of land which may be left only here and there along the line of an improvement in a thickly settled portion of a city. In fact this German system of redistribution works satisfactorily only on land not yet built upon.[16] It may be a relatively simple matter to shift the boundary lines of property which is free from buildings, but to redistribute land covered with buildings will usually necessitate a wholesale destruction of valuable property. When it is applied to a built-up section in a city, the complications and difficulties which arise more than offset its advantages. This scheme further contemplates that few if any of the plots to be redistributed shall be too small for adequate building purposes. In fact, it has been seen that when there are individual holdings which are too small for use after the replotting has taken place, they are disposed of by a process more or less incidental to the main scheme. Now, not the least important aspect

[16] Indeed, the *Lex Adickes* provides that areas built on or used as gardens, etc., may be excluded from the redistribution.

of the problem of remnants of lands, as it arises in the modern American city, is that of dealing with plots which are too small to use. There is no wisdom in redistributing that which is already too small. To attempt, therefore, to utilize the complex plan of the *Lex Adickes* for the purpose of disposing of such fragments of land as these would be burning down the barn to get rid of the rats. It is conceivable that such a plan of redistribution would help the American city in some instances to make necessary and desirable readjustments of property lines, but it is not a plan which will adequately and efficiently eradicate the evil due to remnants of land, as that evil most commonly arises in our municipalities. The fact that newer legislation is coming forward in Prussia to make the acquiring and merging of remnants obligatory upon the city, and that in the state of Würtemberg, which has most up-to-date legislation on this subject, the newest principles of excess condemnation for disposing of remnants are in force, goes far to prove that even in Germany this method of dealing with land remnants is hardly adequate.

The fourth plan for dealing with remnants, and a plan which has frequently been employed by the cities in this country, provides that if the owner of a remnant of land wishes to sell it and the city wishes to buy it, such a transfer may be effected. This involves no peculiar exercise of governmental power.[17] The owner of the remnant cannot be obliged to sell nor can he compel the city to buy. It is merely a private sale which takes place only at the desire of both parties.

[17] The city would doubtless need to have definite authorization for such a practice from the legislature, but there seems no question as to the right of the legislature to give the city such power if it cares to do so.

An early instance of a law thus permitting a city to purchase remnants of land was a New York statute of 1833 applying to the village of Brooklyn.[18] This law provided that " when a residue shall be left of any lot or lots necessary to be taken for such improvement, the said commissioners may, in cases where injury or injustice would otherwise be done, and with the consent in writing of the owner or owners of such lot or lots, include the whole or any part of such residue in their report . . . and estimate separately the value thereof." The city could then buy these remnants and later resell them. It must offer them first to owners of the adjacent property and if a sale could not be effected with them, the remnants must be sold at public auction. There seems to be no record of this law's having been used.[19]

In 1866, the legislature of Massachusetts passed an act allowing the city of Boston thus to purchase, if it deemed it wise to do so, remnants of land caused by the " laying out, altering, widening and improving the streets of Boston." [20]

[18] Laws of New York, 1833, Ch. 319.

[19] It may be that "may" in this statute would be construed "must" by the courts, thus making it obligatory upon the city to buy these remnants if the owner wished to dispose of them. No litigation seems to have arisen under the act and it is included here among the statutes providing for voluntary purchase by the city.

[20] Acts of 1866, Ch. 174. The relevant part of this act is contained in section 8. " Any person owning any estate abutting on any street which may be laid out, widened, discontinued, graded or altered, and liable to assessment under this act, may, at any time before the estimate of damages is made under the second section of this act, give notice in writing to the said board of aldermen that he objects to such assessment and elects to surrender his said estate to the city of Boston, and if said board of aldermen shall then adjudge that public convenience and necessity require the taking of such estate, that such improvements may be made, they shall have full authority and may take the whole of the abutting estate of such person so objecting, and shall thereupon estimate the value thereof

Just how extensively and with what results the powers conferred by these early acts were utilized, it is difficult at this date to determine. In 1904, however, the legislature of Maryland passed an elaborate statute creating a "Commission on the Burnt District of Baltimore City," for the purpose of dealing with the problems of rehabilitation arising after the great fire.[21] The ninth section of this act provided that

> in every case when it shall be necessary, in order to effect the objects proposed, . . . that a portion only of a lot, or a lot and improvements, shall be taken, used or destroyed, and the owner or owners thereof shall claim to be compensated for the whole, the said commissioners may, in such cases, if they deem it necessary and not otherwise, accept a surrender in writing of the whole of said lot, or the whole of said lot and improvements. . . .

Detailed provisions follow for the passing of title to the city and the subsequent resale of the property by the city. This power was exercised by the commission to a limited degree and quite a number of remnants were thus acquired. Some of these were held and used by the city for public purposes while others were disposed of at auction. There was no serious objection to the carrying out of this plan, and the results were on the whole satisfactory.[22]

with all the improvements thereon, excluding the benefit or advantage which has accrued from the said laying out, widening, etc., and the said owner shall convey the same to the said city, and the said city shall pay him therefor the value so estimated. Said city shall sell all the building materials and buildings, and the remaining portion of said estate not used in said widening, grading and improvements, and apply the net proceeds thereof towards the estimated value paid as aforesaid."

[21] Acts of Maryland, 1904, Ch. 87.

[22] a. For this information the writer is indebted to Mr. Joseph

The advantages of this method of dealing with remnants of land are apparent. It may benefit both the property owner and the city. The owner is not obliged to part with his property against his will, but is still afforded in many cases an opportunity to sell at a reasonable figure if he cares to do so. He can thus dispose of property upon which he would be obliged to pay assessments and taxes and out of which he could get little or no use or value. The city, on the other hand, is not compelled to buy, and can thus protect itself against the unprofitable acquisition of land. At the same time, as has already been indicated, it may in many cases be much cheaper, all things considered, for the city to acquire the remnants of land remaining than to leave them in private hands.[23] There would quite likely be sufficient financial advantage to the city in most cases, from the acquisition of these remnants, to enable any owner to sell who wished to do so. But the financial gain to the city is not the only one to be considered. If the city cannot readily and profitably dispose of these remnants, it is at least in a position to see that they are put to the least offensive uses possible. It can protect its own property from wanton and unnecessary disfigurement, and this power is in itself no small gain. In some instances the city may be able to use these plots for municipal pur-

W. Shirley, Chief Engineer of the Topographical Survey Commission of the city of Baltimore.

b. A similar plan, for English cities, is advocated by J. S. Nettleford. His proposal is that "For the purpose of the adjustment or alteration of the boundaries of any such estate or lands as aforesaid the locality may themselves purchase, subject to the provisions of the act of 1909, any land, and may sell or lease the same in whole or in part at such time or times, at such price or prices, and on such conditions as they may think fit." *Practical Town Planning*, pp. 325–326.

[23] *Supra*, p. 29ff.

poses not inappropriate to their environment. In many cases, however, the city would be able to sell such fragments to the adjoining owners and thus accomplish, somewhat indirectly, it is true, an adequate replotting which would do away with the remnants entirely and promote the best and quickest development of the surrounding neighborhood.

Like the plans which have already been discussed, this scheme of permitting the city to buy remnants of land if the owners wish to sell them is good as far as it goes. Its weakness lies in the fact that it does not go far enough. Like any other contract of sale, it depends upon the consent of both parties. If the owner wishes to sell but cannot induce the city to buy or if the city wishes to buy but cannot persuade the owner to sell, an insurmountable obstacle to the transaction is at once raised. This plan can never be, therefore, an adequate and reliable method of dealing with the problem of remnants of land. In fact the plan does not seem to have been designed for a thoroughgoing solution of that problem. Its primary purpose seems to have been to protect the interests of the remnant owner by allowing him to dispose of an unusable fragment if he wishes to do so and can induce the city to take it. But it affords no relief to the public or the owner's neighbors should he refuse to improve or sell his land. On the other hand, while the city may purchase the unusable fragment, it may still be unable to secure any satisfactory replotting if the owners of the adjacent property refuse to purchase the remnant. In that case, the net result would be to transfer a white elephant from its former owner to the city. The plan as a whole seems inadequate in scope and uncertain in operation.

A fifth method of dealing with this problem is merely

a modification of the one just discussed. This is the plan of compelling the city to buy a remnant of land if the owner wishes to sell it. This plan rests upon the principle that since the city has mutilated a man's property and left him something which he cannot use and may not be able to sell, it is really obligated to take the unprofitable remainder off his hands if he so desires. There have been several American statutes passed at various times authorizing such a scheme. In 1810, the city of Charleston found that the creation of street improvements in that city was working serious hardship upon many property owners by leaving upon their hands utterly useless remnants of land. Accordingly, a law was passed requiring the city to buy these remnants on the demand of the owner.[24] In 1832, a statute of Louisiana provided that when part of a man's lot was taken for the purpose of a street opening in New Orleans, the owner could abandon it and compel the city to buy the whole of it.[25] A similar statement, though somewhat more detailed, is found in a Baltimore ordinance of 1858, passed by authority of an act of the Maryland legislature of 1838.[26] Section 7 of this ordinance provided,

that in every case where it shall be necessary to effect the object proposed, that a part only of a house and lot, or of a lot, shall be taken and used, or destroyed, and the owner thereof shall claim to be compensated for the whole, the commissioners shall ascertain the full value thereof as if the whole lot and improvements were necessary to be taken and used for such proposed object.

[24] Referred to in Dunn *vs.* City Council of Charleston, Harper's Law Report (S. C.) 189 (1824).

[25] Act of 1832, referred to in Pierre Boulat *vs.* Municipality Number One, 5 La. Ann., 363 (1850).

[26] Laws 1838, Ch. 226. Upheld in Mayor and Common Council of Baltimore *vs.* Clunet, Merryman, *et al.*, 23 Md., 449 (1865).

Practically the same provision appears in a Massachusetts statute of 1865.[27] The famous Massachusetts Remnants Act of 1904 contains a clause providing that if the owner of a remnant elects to sell the same to the city, the city must purchase it at a price fixed by an appraiser.[28]

Similar provisions occur in the laws of foreign countries. The Land Clauses Consolidation Act of 1845, which has determined the general policy of taking private property for public improvements in England ever since that date, contains the clause: "No party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole thereof." [29] It has already been seen that the *Lex Adickes* in Frankfurt am Main requires the city, when private adjustment is impossible, to purchase such plots of land as are too small to be replotted. The present charter of the city of Montreal contains a clause embodying the same plan.[30]

The only new advantage afforded by the plan of compelling the city to buy remnants when the owners wish to sell them to the city is an advantage accruing to the owner himself. Laws of this character are, of course, framed in his behalf and at his behest. If he does not care to sell his remnant of land he is not obliged to do so, but if he does wish to dispose of it, and cannot negotiate a satisfactory private sale, the city is obliged by law

[27] Acts of 1865, Ch. 159, Sec. 10. " An act to authorize the laying out and widening of a street from Milk Street to Broad Street in the city of Boston."

[28] Laws of 1904, Ch. 443. See *infra*, p. 65ff for the application of this clause in Springfield, Mass.

[29] 8 and 9 Vict., Ch. 18, Sec. 92, 8 May, 1845.

[30] Charter of City of Montreal, 1899. Rev. 1913, Sec. 427.

to buy him out. Of course, the city secures the same incidental advantage here as under the last mentioned plan, namely the opportunity to see that the remnants of lands which it thus acquires are put to the least objectionable uses possible. In the main, however, the provisions of this scheme benefit and protect the landowner and not the public.

In fact, it is urged as a serious objection to this policy that it does not adequately safeguard the interests of the public. It is perfectly apparent that it affords no thoroughgoing solution of the problem of remnants of land. There is no way of compelling a stubborn owner to sell one of these unsightly fragments if he does not wish to do so, and consequently there is no assurance that an effective policy of replotting can be carried out by the city. It is argued furthermore that this plan does not allow the city to protect itself adequately from the making of bad bargains. Unless the city has power to work out an effective scheme of replotting any remnants forced upon it, the purchase may prove a bad bargain. It may be obliged to buy a mutilated plot for which, in its present condition, it has no use, while it has no authority to condemn other remnants which are needed to effect a satisfactory redistribution. There is much justice in the claim that the city ought to be obliged to relieve a private owner of a worthless fragment of land for which it is responsible. But the public interests cannot be properly protected unless the public authorities are given at the same time the broader powers necessary to merge the remnant with the adjacent plots.[81]

[81] So serious was the burden placed upon the public by the provision of the Land Clauses Consolidation Act of 1845 above referred to (page 51) that some of the recent public improvement acts in England have contained clauses relieving the public of the necessity of buying remainders of buildings unless the authorities

From the examination of the methods thus far considered, it would seem that no scheme for dealing with remnants of land can be adequate and successful which does not involve a high degree of public control. The working out of a thoroughgoing plan of replotting and readjustment cannot safely be made contingent upon the consent of the individual property owner. So long as the city is prevented from taking property which is needed for such a redistribution, or is obliged at the same time to take against the better judgment of its officers property which is not needed, the real problem of land remnants will remain untouched. Private interests may be adequately protected; the interests of the public will be neglected or jeopardized.

It is for these reasons that even those who bitterly oppose the application of that policy for other purposes are coming to look with more and more favor upon excess condemnation as the most adequate solution for this complex problem of remnants of land. The scheme seems admirably fitted for this purpose. It merely provides that the city may condemn a remnant of land whenever it deems it wise to do so. The city can thus acquire the unusable and unsightly remnants which line the way of a new improvement and either use them for public purposes or sell them to the adjoining owners. It does away with the ridiculous situation in which the city, having condemned all but a few square feet of a man's estate, is unable to take the rest and prevent its being put to offensive uses. If the power of condemning remnants of land is developed far enough to allow the city to force an adequate replotting of those remnants, even against the wishes of the adjacent owners, the public

deem it wise. London County Council (Tramways and Improvements) Act (1901) 1 Edw. 7, Ch. cclxxi, Sec. 46.

authorities might safely be compelled to purchase any remnant, the owner of which desired to sell, without danger of its being left with land on its hands which it is unable to render usable.

The condemnation of remnants is a policy the law and practice of which it is possible to study in some detail, for it has been tried out in various forms by both European and American cities.

In the year 1852, a law was enacted in France giving cities the right to take the whole of an estate when remnants which were unfitted for building purposes were left along the lines of a new or improved street.[32] The Council of State was authorized to govern, with considerable strictness, the exercise of this power. The most notable examples of the operation of this law are to be found in the city of Paris, and the early efforts to utilize it are described by a special commission sent abroad a number of years ago by the legislature of Massachusetts for the purpose of studying the problem of excess condemnation.[33] At first the city of Paris was inclined to use this power of condemning remnants of land, not only for the purpose of securing adequate building sites, but also for the purpose of recoupment. A decree passed in 1864 provided for the construction of a portion of the rue Reaumur connecting the place de la Bourse with the boulevard Sebastapol. The actual construction did not begin for thirty years, but was finally carried through according to the original plan. In connection with this improvement very large remnants of land, some of them five thousand square feet in area, were condemned by the

[32] Decree of March 26, 1852; Duvergier, *Collection des Lois*, Vol. LII, p. 282.

[33] Supplemental Report, Massachusetts House Document 1096 (1904) pp. 3-10.

city, far in excess of the strict letter of its authority. In the words of the Massachusetts commission, "These remnants were resold for building lots, and in some cases the remnant, which had been taken as being too small to allow the erection of a wholesome building thereon, was divided into two lots, each of which was sold by itself for a building lot." These large plots were taken in order to enable the city to recover, through their resale, part of the cost of making the improvement. They were auctioned off by the city and the prices received for them were very satisfactory.

This policy was, however, open to criticism on two scores. In the first place, it involved a very heavy initial cost for constructing the street. The fact that in this particular case the surplus land was sold at a profit did not alter the fact that, in buying so much land, the city assumed a highly speculative risk which might well have resulted in financial loss. In the second place, such a policy is hardly fair to the landowners whose property is taken. To recoup the cost of an expensive improvement by condemning and reselling the abutting land is one thing, to recoup that cost by condemning only here and there an abutting lot is quite another. The owners of those remnants which were large enough to permit satisfactory private use and development might justly complain that there were no arguments to justify the appropriation of their property which would not apply with equal force to the taking of the property left in the undisturbed possession of their neighbors. The Council of State has, therefore, rigidly limited the application of excess condemnation in recent years to the taking of remnants which are very small and obviously unsuitable for building purposes. Some ten years ago it refused to sanction, in connection with some street improvements,

the taking of remnants of land whose area exceeded six hundred and fifty square feet. In fact, it has sometimes been asserted that the Council of State has seriously impaired the utility of the remnant law by preventing the city from acquiring property which can never be suitably developed as long as it remains in the hands of its present owners. The general result of this stricter policy, however, has been to increase the confidence of the landowners in the wisdom and fairness of the city's program of improvement, and to secure a degree of coöperation from such owners which was before impossible. The experience of Paris would seem, on the whole, to indicate that whatever recoupment the city secures from the condemnation and resale of remnants of land should be purely incidental to the main purpose of the project and should not be allowed to lure the city into an unwise and unjust extension of that plan.[34]

If the French acts of 1852 and 1864 were unwisely liberal in permitting the exercise of the power of condemning remnants of land for the purpose of recoupment, the act passed in 1910 in the German state of Würtemberg goes to the other extreme. By the provisions of this law the municipality is precluded from making any profit, however small, from the resale of the remnants condemned. The city is given liberal power to acquire land. It may condemn the whole of any single

[34] In 1912 an act was passed modifying the decree of 1852 in some particulars. This later law authorizes the city of Paris to condemn remnants of land which, by reason of size or shape, are unsuited to the erection of sanitary buildings or structures compatible with the importance and beauty of the street.

Coupled with this is a provision requiring the city to take a remnant of land upon the demand of its owner when such a remnant is less than half the area of the entire plot and not more than 150 square metres in size. Law of April 10, 1912, found in *Collection Complète des Lois*, etc. (new series), Vol. XII.

lot, part of which is needed for any object of rehabilitation such as the clearance of insanitary or burnt districts. Or when new streets are opened up and remnants are left which prevent the desirable use of the adjoining land, the city may condemn such remnants provided they are single plots. But in either case, the owners of the adjacent property may compel the city to sell the remnants to them at the price at which they were condemned.[35]

This has, of course, two results. It removes any temptation which the city might have to acquire remnants unwisely and unjustly merely for the sake of making a profit. But it also requires that the city abandon to the adjacent owner who desires to secure the remnant an increment in the value of the remnant to which the city itself is clearly entitled. While it is undoubtedly true that the city ought to use excess condemnation for revenue purposes only when it is made applicable to all abutting lands in like manner, there seems to be no reason why it may not legitimately enjoy the profit which is purely incidental to the policy of condemning and replotting remnants.

In the Municipal Act of Ontario, provision is made for the condemnation of remnants for a somewhat limited purpose, but the city is left free to dispose as profitably as it can of the surplus land so taken. This statute provides that,

> Where, in the exercise of its powers of acquiring or expropriating land, it appears to the Council that it can acquire a larger quantity of land from any particular owner at a more reasonable price and on terms more advantageous than those upon which it could obtain the part immediately required for

[35] Kissan, B. W., *op. cit.*, Par. 101.

its purposes, the Council may acquire or expropriate such larger quantity and may afterwards sell and dispose of so much of it as is not required.[86]

The primary aim of this law is to bring about economy in the acquisition of land. The city is to acquire the land needed at the best possible figure, and if it is cheaper to take all of a man's property than to take part of it and leave a remainder, the city should take it all.[87] This power has been of great advantage to the city of Toronto and has made possible the saving of considerable sums of money in the acquisition of lands for corporate uses. The law does not contemplate condemning remnants for the purpose of replotting them, unless they can be acquired under the favorable financial conditions just mentioned. The city is to take no risks and condemn no remnants merely because convenience or esthetic considerations might suggest it. The law does not, therefore, provide a really thoroughgoing program for dealing with land remnants.

There is no such limitation as this in the section of the Halifax city charter dealing with the condemnation of remnants. Under this provision the city council may exercise this power for any reason which seems to it sufficient. "If the engineer reports that it is expedient to do so, the Council may include, in the land to be expropriated, the whole of any property, a part only of which is required for the purpose for which the expropriation is to be made." [88] The city may then resell the surplus and apply the proceeds to the cost of the im-

[86] Revised Statutes of Ontario, Ch. 192, Sec. 322.

[87] Statement of William Johnston, City Solicitor of Toronto, in a letter dated May 2, 1916, addressed to Thomas Adams, Commissioner of Conservation, Ottawa, Ontario.

[88] Halifax City Charter, 1914, Secs. 683, 698.

provement. The assistant city engineer of Halifax writes as follows regarding the working of the plan:

> The reason of the inclusion in the city charter of this clause was that very often, in expropriating lands for widening streets, we may take one-quarter or one-half of the lot, leaving enough for building purposes yet destroying the lot to such an extent that, with the ordinary board of arbitrators, the owner would be awarded compensation amounting to the total value of the lot. We have used the power given under this clause on a few occasions, and have found that it works pretty satisfactorily and gives us a chance to get some return on the money spent in acquiring the property.[39]

The city of Halifax has full discretion in determining what remnants, if any, it will condemn and at what price it will finally resell them. It seems to be a more satisfactory provision than that of any of the other foreign countries which have attempted to deal with the problem.

The first attempt made to confer on an American city the right to acquire remnants of land by eminent domain was in a New York statute of 1812 giving that power to the city of New York.[40] The American provisions for condemning remnants have never varied much from the general lines laid down in this early law. When only a part of a man's estate was necessary for a public improvement, the proper city authorities "if they deem it expedient and proper to do so" might include such remainder in the land to be condemned. Whatever portion of this surplus land was not needed by the city for a public use might be sold and the proceeds applied to the cost of making the improvement. The city of New York

[39] Mr. H. W. Johnston, in a letter to the author, June 5, 1916.
[40] Laws of 1812, Ch. 174, Sec. 3.

made use of this plan in connection with several early street improvements.[41] In 1834, however, the law was declared unconstitutional by the highest court of the state on the ground that it authorized a taking of private property for a purpose which was not public in character.[42]

As early as 1810, the problem of remnants of land had become acute in the city of Charleston, South Carolina, in connection with the widening of streets. The various efforts of the legislature to meet this situation are described in the opinion of the Supreme Court of the state in the case of Dunn *vs.* City Council of Charleston.[43] The city at first had the power to condemn only the land which was actually needed for the street itself. Individual owners complained bitterly, however, that worthless fragments of lots were thus left upon their hands. To relieve this situation, a law was passed compelling the city to buy such mutilated lots as were of no value, and pay for them by special assessments upon the property benefited by the improvement. This plan was not successful, and a law was passed, in 1817, giving the city authority to take such remnants by right of eminent domain. The city proceeded without much delay to exercise this new power. It condemned, not only that portion of Dunn's property which was needed for a street improvement, but also a large and valuable remnant. This remnant, taken over the protest of Dunn, was sold by the city, after the completion of the improvement, for twice the amount which the city had paid for it. Dunn appealed to the courts and in 1824 the Supreme

[41] Brief but interesting data regarding these early projects is found in H. S. Swan's monograph, *op. cit.*, p. 54.

[42] In Matter of Albany Street, 11 Wend., 149, *infra*, p. 285ff.

[43] For full discussion of the case of Dunn *vs.* City Council of Charleston see *infra*, p. 281ff.

Court of the state construed the law in question in such a way as to give to the city of Charleston the right to condemn only such land as was actually to be used in constructing the street. It is quite true that the statute of 1817 was somewhat ambiguously worded, but there seems to be little question that the legislature had intended to confer upon the city the full power of condemning remnants of land — a power similar to that conferred by the New York act of 1812. The court, however, convinced that the condemnation of remnants was not a legitimate exercise of the right of eminent domain, gave the statute a somewhat strained interpretation in order to avoid the necessity of declaring it unconstitutional.[44]

In 1868 the legislature of Pennsylvania conferred upon the Fairmount Park Commission of Philadelphia the authority to condemn remnants of land and resell them.[45] The only instance discovered in which this power was used occurred a few years ago. A triangle of land, about three acres in area, located at Thirty-third and Ridge Streets was condemned. The city later exchanged this plot, which formed a valuable building site, for seventy-five acres of land in Roberts Hollow which it desired for park purposes.[46]

By far the most interesting and important act providing for excess condemnation of remnants of land has been passed, however, by the state of Massachusetts. In 1903 a special committee of the state legislature submitted the elaborate report upon the subject of excess condemnation already mentioned.[47] The recommendations

[44] Harper's Law Report, S. C. 189 (1824).

[45] Laws of 1868, No. 1020.

[46] The writer is indebted for this information to Mr. Andrew Wright Crawford, Secretary of the Art Jury of Philadelphia.

[47] *Supra*, p. 54.

of this commission were embodied in part in a draft of a proposed statute providing for the condemnation and replotting of remnants. There are five features of this proposed law which are worthy of note. First, it gave cities the power to condemn unusable remnants of land. In the second place, it authorized the city to offer such a remnant to the owner of the adjoining parcel with which the public authorities deemed it wise to unite the remnant at a price fixed by an elaborate system of appraisal. Third, if this offer was not accepted the city might condemn the whole or any portion of the property of such adjoining owner. Fourth, all the surplus land taken under the provisions of the act should be sold at public auction. Fifth, the owner of a remnant the area of which was not more than one thousand square feet might compel the city to purchase it.[48] Such a law would allow a municipality to condemn not merely remnants of land but enough additional land to make possible an adequate replotting of such remnants into suitable building lots. The legislature was unwilling to go to this extent, however, and contented itself with passing, in 1904, an act allowing cities to condemn merely the remnants of land left by the construction of an improvement.[49] This is a very elaborate law of some thirty sections setting forth in great detail the exact procedure to be followed at every stage of the process of taking and disposing of such remnants. The most significant part of the statute is the second section which reads:

The Commonwealth, or any city in the Commonwealth so far as territory within the limits is concerned, may, in the manner hereinafter set forth, take in fee, by right of eminent do-

[48] Massachusetts House Document No. 288 (1904), pp. 15–20.
[49] Acts of 1904, Ch. 443.

main, the whole of any estate, part of which is actually required for the laying out, alteration or location by it of any public work, if the remnant left after taking such part would from its size or shape be unsuited for the erection of suitable and appropriate buildings, and if public convenience and necessity require such taking.

It is important to note that this law does not confer upon the city or state unlimited discretion in the taking of remnants. The land which may be condemned in excess of actual need is only that which is not suitable for independent development. In other words, no broad power seems to be given to condemn all estates, any part of which, however small, may be needed for actual public use. The report of the Joint Board on Metropolitan Improvements, submitted to the Massachusetts legislature in 1911, shows how relatively limited is the power actually conferred by this act. One of the proposals made by this board was the creation of a business thoroughfare between the two leading railway terminals of Boston.[50] In order to open this thoroughfare, it would be necessary to take for actual street purposes all or part of one hundred and fifty-eight separate estates. If the city should use the power granted by the act of 1904 and condemn in addition to the land actually needed for the street such remnants as would be definitely unsuited for the erection of appropriate buildings, it would then condemn fifty-two additional parcels with an area of 48,274 square feet. This, it was held, was all that a fair construction of the Remnants Act would allow the city to take by eminent

[50] *Final Report of the Joint Board on Metropolitan Improvements*, 1911. Pages 110–113 comprise "Plan for the Extension of Northern Avenue, Boston, Establishing a New Traffic Thoroughfare and a Location for a Tunnel Between the North and South Terminals." Revised Estimates by Leslie C. Wead, November, 1910.

domain. If, however, the city took the whole of every plot of which it needed any part,— that is, if it acquired all the one hundred and fifty-eight holdings just mentioned,— it would take 193,474 square feet lying outside the boundaries of the street. On the other hand, if the city could exercise the powers conferred by the act proposed by the commission of 1903, and could condemn not only the remainders left by the improvement but also such adjoining estates as might be needed to make possible the suitable replotting and development of the whole tract, it would acquire one hundred and twenty-one additional holdings, no part of which was needed for street purposes and comprising 223,664 square feet. Under this third plan, the entire amount of land taken lying outside the boundaries of the thoroughfare would be 417,138 square feet.[51]

It is apparent, therefore, that the famous Remnants Act of 1904 does not confer upon the cities of Massachusetts the widest powers that are possible in dealing with land remnants.

None of these three plans for opening a business thoroughfare in the city of Boston has ever been carried out. In fact, Boston seems as yet not to have availed

[51] The report of the board contains some interesting estimates of the financial results of these three plans. Assuming that the city disposed of its surplus land at a reasonable price, it was estimated that the net return derived from such resale would be $290,280 greater if all the one hundred and fifty-eight estates were taken, than it would if the city acquired merely the unusable remnants; while if the one hundred and twenty-one adjoining parcels were also condemned, the net cost of the entire improvement would be $1,570,075 less than under the second plan. The board felt, however, that there were so many risks incident to the operation of the two more radical policies, that it would be wiser for the city to confine itself to the narrower program outlined in the act of 1904.

itself of its power of condemning remnants of land. The little actual experience which has been had under the act of 1904 has taken place in the city of Springfield, where remnants have been condemned in connection with several projects for the widening or alteration of streets.

The most interesting of these undertakings, and the one which gives perhaps the clearest idea of the actual working of the Remnants Act, is the Fulton Street widening, which was begun in 1914 and is now nearing completion.

The purpose of this improvement is to widen Fulton Street from thirty-three to seventy feet for five blocks, or a distance of about five hundred yards. The district was not very attractive; one side of the street was built up, for the most part, with medium sized frame buildings and the other side was given over to railroad yards and warehouses. The land necessary for the widening was all taken from that side on which were the separate buildings. To move the street line back upon these abutting properties a distance of thirty-seven feet was, of course, to run it squarely through most of these buildings and some thirty of them had to be destroyed or moved. In a majority of cases the remnants of the lots thus mutilated were quite small and the owners were willing to have the city acquire the entire plots instead of leaving the remainders on their hands. This the city deemed it advisable to do and the transfer of the greater number of these parcels was accomplished simply by private agreement with the owners. There were six properties, however, which could not thus be acquired by agreement with the owners, and it still seemed to the board of public works that public policy demanded the taking of these plots. They were accordingly condemned

by the city, under authority of the act of 1904.[52] It seemed to the city authorities that it was wiser and more economical to acquire this surplus land than to take merely what would be used for street purposes. It is too early as yet, however, to determine just what the financial results of this excess condemnation will be. The city still holds these remnants and has turned the largest one over for the use of its street department. There has been no replotting as yet, and as there is still a good deal of work left to be done in the actual widening of the street, the precise effect of the improvement upon surrounding land values is not accurately known.

A glance at the table showing the size of the remnants of land condemned in this street widening will indicate that a very liberal construction was placed, in one or two instances, upon the authority conferred by the act of

[52] The accompanying table shows the size and value of the remnants thus condemned.

NAME	AREA IN SQ. FT.	LAND DAMAGES	BUILDING DAMAGES	TOTAL
Joseph Menard— 44.13′ front 21.1 deep	1,062	$3,919	$ 800	$ 4,719
Conn. Rw. R. R. Co.— 41.33′ 27.1	1,112	3,985	700	4,685
Mary A. Barrett— 41.16′ 27.6	1,134	3,806	600	4,406
Thom. E. King— 38.7′ 22.96	875	3,153	800	3,953
Michael J. Dam— 106.55′ 59.5	6,334	20,876	5,892	26,768
Benj. S. Albert— 80.′ 25.5	1,852	6,219	2,000	8,219

1904. It has already been made clear that that act contemplated the taking of such remnants as were unsuitable for the erection of appropriate buildings, and which the public convenience and necessity might require should be condemned. It is probably fair to say that lots which are but twenty-five feet deep are not suitable for the erection of appropriate buildings. But a lot with a frontage of one hundred and six feet, a depth of sixty feet and an area of 6,334 square feet would seem to be in a different class. If this is a remnant within the meaning of the statute, it is hard to see where the line is to be drawn between parcels which are small enough to be taken and those which are too large. In this particular instance, the owner did not feel that this large remainder was of sufficient size to use to advantage in his particular line of business, and apparently did not object to the condemnation of his land. Had he cared to contest the taking, it seems unlikely that the right of the city to condemn so large a remnant would have been upheld. It is probable, also, that had he raised serious objection the city would have declined to enter upon so doubtful a proceeding.[58]

A somewhat detailed analysis has been given of the various American and foreign provisions embodying the right to use excess condemnation for the handling of remnants of land. Such information as is available in regard to the practical working of these provisions has been briefly presented, rather than at length. None of them can escape serious criticism when viewed as a thoroughgoing solution of the time honored and vexed problem arising from remnants of land, and yet there is much

[58] For all the information relating to this project the writer is indebted to the courtesy of Mr. Charles H. Slocum, Assistant City Engineer of the city of Springfield, and Clerk of the Board of Public Works.

of value in each of them. There has been too little experience with the plan, as yet, to warrant the drawing of any infallible conclusions regarding the best type of law for accomplishing this purpose. The following conclusions make no claim to infallibility. It is submitted, however, that there are three features which are essential to any statute which would offer a really effective remedy for the evil of land remnants.

In the first place, a city should be given the authority to condemn remnants of land for two purposes: first, to effect a saving of money to the city; and second, to secure adequate building sites along any public improvement. In the first place, it should be permissible to condemn a remnant when the cost of acquiring the whole of an estate would be less than the cost of taking only part and paying damages on the remainder. In other words, when it is necessary to take a remnant in order to secure at the best price what the city needs for the purposes of its improvement, the remnant should be taken. It is not, however, legitimate to condemn remnants of land which the city has no other good reason for taking, merely because their resale would give the city a profit. No attempt is made at this juncture to pass judgment upon the merits of a policy of excess condemnation carried on for the purpose of recoupment. It is urged, however, that to enter into a policy of condemning only remnants of land for that purpose would result in serious practical difficulties and gross injustice to private citizens. It is legitimate to take remnants of land in order to save money, it is not legitimate to take them solely in order to make money. Aside from this motive of economy, remnants should be condemned only when necessary in order to secure suitable building sites abutting on a public improvement. The wording of the Massa-

chusetts act covers the case, in specifying that the whole of a lot may be taken, "if the remnant left after taking such part would from its size or shape be unsuited for the erection of suitable and appropriate buildings, and if public convenience and necessity require such taking." To condemn the whole of a large estate, however, because a few feet have been sliced off from it for street purposes, and to leave untouched the adjoining lot which may be smaller, merely because it has not been so disturbed, is to lose sight of the real nature of the evil of land remnants and is to discriminate unfairly between the two owners. If the city wishes to condemn large parcels of abutting land in order to assure their proper development or control their use, it should secure broader powers of excess condemnation and should exercise them with uniformity. It should not attempt to use its power to condemn remnants for purposes which have nothing to do with the problem of remnants.

The second essential of a satisfactory law for the controlling of remnants is the power of the city to dispose of the land not needed for actual public use on the best terms possible. The city ought not to take remnants of land for the sole purpose of making money. When there is a legitimate reason, however, for taking the remnant, the city is fairly entitled to whatever measure of profit or recoupment it may make by reselling that remnant at the highest possible price. To compel the city to dispose of such land at the price paid for it, is to bestow as a gift upon the purchaser a value created entirely by the city's money and enterprise.

The third element in a thoroughgoing scheme for handling land remnants is a provision allowing the city to effect a satisfactory replotting of such fragments and the land adjoining them when that is necessary. When

the city takes a parcel of land which is quite unusable because of its size or shape, it is essential to the public interest that this fragment be merged with one of the adjacent plots. There should be a method of compelling this merging, if it cannot be accomplished by private agreement. If the owners of the property surrounding the remnant refuse to buy it at a fair price, the city should be given the power to condemn enough of that adjoining land to permit the satisfactory replotting of the district. The city could thus be sure that all the land abutting on an improvement is made available for appropriate buildings and would not be placed in the absurd position of condemning an unusable remnant, and then keeping it or reselling it without making it any more usable. If the city has power to compel an adjoining owner either to buy a remnant or to sell his property at a fair price, he would, in nine cases out of ten, choose to buy the remnant and the desired adjustment would be made without any drastic action by the city. In the tenth case, the city could still protect its interests and prevent the blighting effect of a useless scrap of land. It is hard to see how the city can be sure of securing a satisfactory replotting of land remnants without this power.

An effective policy of dealing with remnants of land ought, then, to involve these three things: the power of the city to condemn remnants when it would save money to do so or when they are unsuitable for independent use; the power to dispose of such remnants at the terms most advantageous to the city; and the power to secure an adequate replotting of those remnants by compelling the owners of adjoining property either to buy or to sell. If the city enjoys these powers, it is, so far as this particular problem is concerned, the master of its own destiny. It is no longer at the mercy of any stubborn in-

dividual who happens to own a worthless fragment of land. It is in a position to protect the public, as well as the abutting property owners, from all the disfiguring and depreciating effects of land remnants; and at the same time it can usually reduce, in a measurable degree, the cost of the improvement.

All this the city can accomplish with the smallest possible interference with individual liberty and property rights. The other methods by which cities have attempted to deal with remnants have been examined. In each case it was clear that an adequate and effective solution of the problem was impossible, because the city did not possess the power of independent and direct action. In every instance there was danger that the purpose of the city would be thwarted, the best interests of the community prejudiced, by the persistent unwillingness or inability of a property owner to coöperate to effect an adequate replotting. In each case it was seen that a larger measure of public control was necessary if the community interests were to be adequately guarded. It is believed that the proposed plan for the condemnation and replotting of remnants of land goes far enough, but not too far. It confers upon the city sufficient power to deal effectively with this difficult problem, but gives it no unnecessary authority.

The value of these other means of dealing with remnants of land should not be underrated. There is no need even to give up using them. It is only necessary to abandon them as exclusive policies. There is no reason why property owners should not coöperate in the replotting of their lands, and the more they do so the better. There is no reason why the municipality should not aid and encourage that coöperation by every means in its power. It seems only just that the city should be

compelled to purchase the whole of an estate which it has hopelessly mutilated, if the owner wishes to sell the remnant. Such a provision should be made an adjunct to every statute dealing with the remnant problem. When the municipality has the power to guarantee the satisfactory replotting of such fragments, the necessity of taking them ceases to be an unreasonable burden. The owner protects himself by selling the remnant, the city protects itself by replotting it. It may be that such elements of the famous *Lex Adickes* as are applicable to American conditions might wisely be transplanted to this country. There is nothing in any of these plans which is essentially incompatible with the proposed policy of excess condemnation. But whichever one of these less vigorous policies is retained, or if they are all retained as they might well be, the city should still be given the power to take remnants of land by eminent domain together with enough adjoining land to effect their assimilation. It might not be necessary to use that power frequently; it should be possible to use it when it is necessary.

In an earlier chapter it was stated that excess condemnation as a solution of the problem of land remnants was easily defensible in principle, unless it should be found that some other less drastic solution should prove equally effective.[54] It is now possible to venture the conclusion, not merely that excess condemnation furnishes the best solution available for that problem, but also that it is the only policy which adequately and effectively meets the public need. It strikes the wisest and fairest balance between social control and the protection of individual rights.

[54] Ch. I, p. 13.

CHAPTER III

EXCESS CONDEMNATION FOR THE PROTECTION OF PUBLIC IMPROVEMENTS

ONE of the principal purposes for which it is proposed to use excess condemnation is to protect public improvements by preventing the adjoining property from being put to uses which directly or indirectly injure those improvements and prevent them from serving in the fullest degree the ends for which they were created.[1]

This will very frequently be an esthetic protection, and excess condemnation is sometimes spoken of as a means of promoting the "city beautiful." It would be a mistake, however, to regard it exclusively as a method of advancing the cause of civic beauty. Just as city planning is not solely the function of the artist and the architect; just as a park, beautiful as it may be, is dedicated also to public health and play; so the protection afforded by excess condemnation is not confined to the beauty of a public improvement, but extends to the health, light, air, convenience and general usefulness of it. It is the purpose of this chapter to discuss excess condemnation as a means of thus protecting public improvements.

Those who look upon excess condemnation as a means

[1] This statement is of course broad enough to include the use of excess condemnation as a means of dealing with remnants of land. While the taking and replotting of remnants is a method of protecting a public improvement, the evil to be dealt with is, however, rooted in so specific a cause and demands so unique a remedy as to warrant its isolation as a separate problem.

of conserving the beauty and convenience of the modern city especially urge its application to the problem of securing and preserving suitable sites for public buildings and places. And since this problem has several unique and interesting features, it may be well to dispose of it before proceeding to the more general discussion.

The problem of public building sites is not new in American cities, and it is a problem which grows increasingly acute. It is a problem which arises as a result of the unbusinesslike methods by which cities have normally secured, and continue to secure, the land needed for public buildings.

There are three criticisms which may be urged against our present policy of securing these locations. As a matter of fact it is not a policy at all. It is merely a series of fortuitous events — crises in its physical development which the city seems never to foresee, from the occurrence of which it learns no lesson. The first indictment against the present method of dealing with this important problem is that our cities do not plan ahead as to where they will need to locate public buildings, nor make any provision in advance for securing appropriate sites. They act upon the principle of never crossing a bridge till they come to it. When a city has grown sufficiently to need a new schoolhouse, then there will be time enough to look around and see if a suitable site can be obtained. And for all this short-sightedness the city pays the bills, not only in money but also in the inconvenient and inharmonious location of its public buildings. The need for a new public building is frequently due to the growth and development in a certain portion of the city. That same growth and development have caused site values in the vicinity to soar. The same considerations of accessibility which make a particular

spot an advantageous place for a post-office may also make it an ideal place for a business block — and in nine cases out of ten the business block gets there first. By the time the city authorities have become convinced that a public building is necessary, the places where that building ought to be placed have often long since been covered with buildings too costly to condemn; and even the less attractive locations still available are held for prices which are almost prohibitive.

Many cities in the United States have frequently found themselves placed in just this predicament. Site values in downtown New York are perhaps higher than anywhere else in the country, and the city has been obliged, as a result, to pay millions of dollars which a more foresighted policy of planning for municipal buildings might have saved. Some of the small parks created during the last twenty years, little open spaces hemmed in by skyscrapers or tenements, have cost the city of New York more money than did the vast tract of land now comprising Central Park. In some instances these squares and public places have been paid for at the rate of $5,000,000 per acre, while, at the same time, the city, planning for the future in the outlying boroughs, was securing park land for $5,000 an acre.[2] "The city has paid for school sites in congested sections of Manhattan as high as $20 per square foot; while the average price paid, per square foot, for school sites in Brooklyn and the Bronx, for the last few years, has been approximately $1.50 per square foot and in Queens less than $.75 per square foot."[3] It is useless to multiply instances of a condition of affairs so widely prevalent. By

[2] *Report of New York City Commission on the Congestion of Population*, 1911, p. 13.
[3] *Ibid*, p. 12.

failing to look ahead, our cities are continually shutting themselves out from the places where the public buildings really ought to be, and are paying exceedingly high prices for the less attractive sites which are left.

Another weakness in our present policy of securing public building sites is the failure to realize that public convenience will finally demand that some of these buildings should be grouped together, and the failure to secure sites which would make such grouping possible. This does not mean that every city need have a stately civic center such as that proposed for Cleveland or Chicago, where all public buildings are to be grouped together in one splendid and symmetrical scheme. Nor does it mean that it is necessary to reproduce on a glorified scale the town hall on the square — the useful if not beautiful edifice, comprising within its four walls the offices of all the local officials, the public auditorium, the courtroom, the fire station and the town lockup. Not all public buildings need to be put close together; and yet, as soon as a town grows beyond the point where every place in it is within walking distance of every other place, it is easy to see that there are some buildings which should be grouped and that many of them ought to be left with some open space around them. The larger a city grows the more important do these considerations become; and it is now generally recognized that the city's offices, its court house, its prison should be within convenient reach of each other. Branch libraries and schools might well be grouped together, and there are many public institutions which need just the setting which a location near a public park would give them. It would not seem unreasonable to expect that the city authorities, in securing sites for these public buildings, would bear these things more clearly in mind and secure, while it is to be had at a

reasonable price, land enough to permit such a grouping as soon as the needs of the city call for expansion. In almost every instance, however, the city secures only what it needs to-day — a single plot of ground on which a single building can be erected.[4]

The effect of this tardy effort to bring about a suitable grouping of public buildings is illustrated rather clearly by the recent experience of New York County in acquiring a site for its new Court House. The fact that the grouping effected was a mixed grouping of county and municipal buildings does not alter the fact that the delay in completing the group has cost the county a large sum of money which might have been saved had these invaluable sites been secured when it first became apparent that they would be needed for public purposes. The site selected for the Court House immediately adjoins City Hall Park, the Municipal Building and the Hall of Records. A memorandum, recently submitted to the Committee on City Plan of the Board of Estimate and Apportionment, stated:

> The choice of this site was made, not only for the reason that the blocks in question were immediately contiguous to City Hall Park and the present groupings of municipal buildings, but for the added reason that the lots in question were assessed at low valuations, and afforded an exceptional opportunity for the development of a new civic center upon a basis that ultimately would bring a very substantial return to the city in the increased valuation of its own holdings, and

[4] The need for more foresightedness in dealing with this problem is becoming generally recognized, and many recommendations are coming from various sources as to the proper solution. See *Report of Improvement Commission of New York City,* 1907. pp. 28–29; *Grouping of Public Buildings,* Bulletin No. 2, Municipal Art Society, Hartford, Conn, 1904, p. 23; *Plan of Chicago,* Chicago Commercial Club, 1909, pp. 123, 135; *Plan of Seattle,* 1911, p. 34.

in the development of the higher taxable values in the adjoining private property.[5]

In spite of the fact that the land acquired was assessed at a low valuation, the city paid $6,243,668 for the 4.2 acres which it took.[6] This is, unquestionably, a price somewhat higher than would have been paid before the erection of the Municipal Building, had the Court House plans been made in time to permit the securing of the site at the time. But, on the other hand, the report mentioned clearly indicates that the city is saving an enormous amount of money by acquiring now the land needed instead of waiting until an almost certain increase in land values has taken place. It is very clear that it is false economy for a city to be too niggardly in acquiring sites for public buildings. If a city refuses to look to the future when buying land for this purpose, it may find itself obliged to pay an enormous price for the grouping of buildings which is so much desired.

A third mistake which our cities commonly make, in the locating of public buildings and places, is quite similar to the one just discussed. This is the failure to secure land enough to allow the enlargements which become necessary with the city's growth. Schoolhouses and libraries and playgrounds which are large enough to-day will, in most cases, be too small ten years from now; and the most effective way to meet the need will probably be to expand the present quarters. Here again, lack of foresight frequently prevents the city authorities from realizing that the needs of to-morrow will be greater than

[5] *Memorandum submitted to the Committee on City Plan of the Board of Estimate, with Relation to Proposed Modifications in the Site of the New York County Court House and the Layout of Surrounding Streets and Parkways*, pp. 1–2.

[6] *Ibid*, p. 5.

the needs of to-day. As a rule a site is secured only large enough for immediate needs, on the assumption that when an enlargement is necessary, then there will be time enough to think about securing what additional land is necessary. Perhaps this mistake is most likely to be made in large and rapidly growing cities, but where it is made it places a heavy burden upon the city. The report of the New York City Commission on Congestion of Population, already mentioned, shows the experience of the city of New York in acquiring sites for its school buildings. "The history of the acquisition of land by New York City shows, unfortunately, a 'piecemeal' purchase of land entirely out of proportion to the increasing needs of the community. Of 513 school sites in New York City, in 229 cases, nearly one-half, less than the entire site was purchased at one time. In 17 cases the total amount of land required was secured at five different times, extending over a series of years." [7]

In all of these cases the city pays the penalty for its shortsightedness by being obliged to buy land it needs at the constantly rising congestion values.[8]

It is not much to be wondered at that our cities have not in the past more frequently avoided the costly mistakes which have just been described. It is futile to rail against the generations before the Civil War for not foreseeing the needs of the cities of to-day. Hindsight is much easier to exercise than foresight, and it is quite unlikely that the most vigorous imaginations of our great grandfathers could have pictured, with any accuracy, the modern twentieth century city. Men with the spirit of

[7] *Report of New York City Commission on the Congestion of Population*, 1911, p. 49.

[8] How much the city has lost through its inability to foresee the needs of the future or its unwillingness to provide for them is indicated in the following two tables which show the prices at which

pioneers, who carried civilization to a new country, can be forgiven if their work in city building lacks the fineness and artistic vision of the modern city planning experts.

But while it is possible to excuse the shortsightedness of men who worked without a model and without experience and made the mistakes of honest ignorance, this can not be done for modern city authorities, who at great cost correct the mistakes of their grandfathers with one hand, and with the other duplicate those mistakes to harass the next generation. Now it is not to be expected that the average American city can anticipate all its needs for all time to come. To declare with positiveness that on a particular spot in the now undeveloped suburbs of a city a schoolhouse should stand eighty years from now, is to the mind of most practical minded citizens an attempt, not at city planning, but at divination. There are, however, many needs of the city which can be definitely foreseen, and certainly it is merely the commonest kind of good business policy for the city to make provision for those needs as early and as definitely as it can. It may seem foolish for a man with a blueprint in his hand to stand in the middle of a farm outside the city limits and announce that a library or fire station

the city secured, at various times, the land for two schoolhouses, one in Manhattan and one in Brooklyn:

School 14, 33 Greenwich Avenue (Manhattan)

Year	Price
1849	$ 0.79 per square foot
1851	.84 per square foot
1890	8.40 per square foot
1897	9.56 per square foot
1905	13.37 per square foot

School 34, Morman, Eckford, Oakland Streets (Brooklyn)

Year	Price
1867	$0.23 per square foot
1904	3.16 per square foot
1906	7.16 per square foot

Ibid, p. 56.

should be located at precisely that point at some time in the dim future. It is not absurd, however, for a city to realize that a community cannot do without fire stations and schoolhouses, and, when it plots a suburban tract, to secure enough land at a low price to forestall such needs. Nor is it unreasonable for a city to assume that it may ultimately need to enlarge some of its public buildings, and with that end in view to secure, while prices are low, sites large enough for that purpose. It is, in short, a safe and sane policy for any city, in providing for public buildings and public places, to plan ahead as definitely as is possible for those needs which it is obviously reasonable to suppose will arise.

There are many who feel that, if the city were to apply to this problem of securing appropriate sites for public buildings and places the principle of excess condemnation, it could then pursue a farsighted and businesslike policy. It could estimate its present needs and its future needs. It would acquire ample land for both. It would not be scrupulous to confine itself to the narrowest measure of those needs. The conviction that at some time the public will need land in a particular district will justify the condemning of a generous plot — even more than it is supposed the city can use. The city will hold these lands until the development of the neighborhood necessitates their use. Public buildings will be erected or open spaces reserved. There will be room to group buildings together harmoniously and conveniently in an appropriate setting. Should it become necessary to enlarge the buildings, there will be room enough for such expansion. When the city has met all its needs, the land which it does not care to use for a public purpose can be sold or leased. It would usually be sold at a handsome profit, and it ought always to be sold under such restrictions as

will protect the public buildings or open spaces from disfigurement or injury. Such, it is urged, is the way in which excess condemnation would meet the problem of public building sites. The principle is exceedingly simple. It is merely the policy of buying more than you can be sure you will definitely need, in order to be certain that you have enough. The city knows that it can use five acres of land in a certain district, it feels rather sure that it might want to use six or seven acres, and so it purchases ten acres; knowing that it is not acquiring a perishable commodity which will spoil on its hands, but property which it will usually be able to sell later, if it cares to, at a higher price than it paid for it.

The question arises at once, whether this method of securing public building sites is really excess condemnation in the sense in which that term is usually defined.

There is certainly no question but what this scheme involves a rather liberal expansion of the ordinary policy of exercising the right of eminent domain. The city takes, under it, more land than it needs at the time. It takes land which it may never need, merely because it wishes to play safe. It may not even be sure to just what use the land will be put if it finally declines to use it. When we speak of taking private property for a public purpose, we assume that that property is needed for a definite and immediate use by the city. The use here, however, is neither definite nor immediate, and there is even considerable uncertainty whether such a use will ever exist. There are some instances in which American cities have been allowed to condemn a particular parcel of land "for building or park or any public purpose,"[9] but no general power of this character is

[9] Massachusetts Laws, 1912, Ch. 475; New York Laws, 1914, Ch. 530.

ordinarily given to municipalities in this country. Nettleford cites an old English statute dating back to Edward III, on the other hand, which forbids an English public authority from buying or holding land unless it specifies exactly the purpose for which it is to be used.[10] In law, as well as in theory, condemnation, for the general and indefinite purpose here proposed, is a departure from the ordinary exercise of the right of eminent domain.

On the other hand, this policy differs from excess condemnation as already defined, because it does not contemplate the acquisition, for a purpose supplementary to that of creating a public improvement, of land which the city knows definitely that it will dispose of later.[11] It is tolerably certain, perhaps, that it is taking more land than it needs, but its needs are still somewhat vague. The line between the land which the city will use and that which it will not use cannot be definitely drawn. Such land as the city may finally resell is not condemned for the purpose of such resale, but rather because the city wished to provide amply for all its needs for building sites. When the city thus condemns land for a general public purpose, whatever land it resells bears the same relation to what it actually uses that the surplus which is left after a suit of clothes has been cut from a piece of cloth bears to the part actually used. The city knows it is acquiring more than is actually needed, but just how much and just which parts are to be left over it cannot tell. In excess condemnation, however, the city acquires pieces of land which it knows it cannot use, and which it knows it will dispose of later on. The difference is one of intention, but that difference is sufficient to distinguish the two policies. This peculiar problem of

[10] *Practical Town Planning*, p. 164.
[11] *Supra*, p. 3ff.

securing appropriate public building sites does not itself call for the use of real excess condemnation.

It is unnecessary to enter at great length into the merits and limitations of this policy of condemning land for public purposes of an indeterminate character. It would undoubtedly enable the city to overcome most of the difficulties with which it must now deal in the securing of adequate sites for public buildings and places. The city could plan more carefully for its future needs. It would usually enable the city to secure appropriate sites at more reasonable prices. Whatever land was left over could be resold and perhaps some profit would be made.

If the city did not need the land for immediate building purposes, it might perhaps use it temporarily for public parks or playgrounds. If it could not afford to hold the land for a long period without some money return on it, some plan could probably be devised by which it could be rented on short term leases, which would bring in a regular income and still allow the city to take possession when it needed to do so. If this policy were pursued, the city could perhaps in many cases afford to acquire, against a future need, land already built upon; and leave the present occupant in undisturbed possession for a considerable period of time. The income thus received might reasonably be expected to pay the interest charges on the purchase price and reimburse the city for the loss of taxes on the land.

There are, of course, a number of practical difficulties connected with such a program as this. To the minds of many citizens it would be exceedingly unwise to confer upon our city authorities the power to condemn private property indiscriminately for purposes which need not be definitely stated at the time. Such a power would need to be carefully checked to prevent its abuse through

inefficiency or favoritism. Most of the objections to the policy arise from a fear of its faulty administration, rather than from a serious protest against the inherent character of the system itself. It seems on the whole that a cautious use of this scheme would mean much to American cities in the way of good city planning and economy.

We turn now to the main problem of using excess condemnation as a means of protecting public improvements. To achieve this end, the city condemns more land than it wishes to use for an improvement, and resells or leases the surplus with such restriction as to its future use as will adequately protect the usefulness and appearance of that improvement. It is, of course, unnecessary that this should be the only motive for the use of excess condemnation in a given case. There is no reason why the city should not condemn land in excess for the combined purpose of replotting remnants of land, reselling the surplus at a profit and affording the improvement adequate protection. In this chapter, however, the policy will be discussed as a protective measure.

There is probably no city in the United States in which hideous examples do not exist of the need of some means of protecting a public improvement from the inappropriate or injurious use of the surrounding property. Sooner or later the city must discover some way of exercising this kind of control. It is possible for a park or boulevard to be well-nigh ruined by the uses to which the abutting owners put their property. If the city of New York had not taken for park purposes most of the land lying between Riverside Drive and the Hudson, there is no question whatever but that both sides of that famous pleasure drive would have been lined solidly with tall apartment houses, and instead of looking out on the river and Palisades, the passerby would have found himself in

a cheerless canyon between rows of ten-story fronts. By creating Riverside Park, the city was able to preserve the light, air and view on one side of Riverside Drive. There were other abuses however which the city was not able to prevent. It was not able to prevent the other side of the drive from being marred, at intervals, by billboards and other eyesores, which destroy to a considerable degree the beauty of the improvement. It is unnecessary to multiply evidence of the fact that private interest and civic pride are not sufficient to prevent the attractiveness and usefulness of a splendid public improvement from being seriously impaired by the inappropriate uses to which the adjoining property is put.

Without some control over the surrounding property, furthermore, the city cannot be sure of accomplishing effectively the purpose for which it has constructed the improvement. It may wish to open a business thoroughfare to meet the needs of a growing city and find itself quite unable to forbid the erection of dwelling houses or low-class buildings along its length. It may desire to open a residence street for workmen in a factory district, but still be powerless to prevent the encroachment of mercantile and industrial interests. The hands of the city are practically tied. It may have a wise and foreseeing plan for its own development carefully worked out, and still be compelled to look helplessly on and see that plan thwarted or delayed by the selfishness of private interests which it is unable to control or direct.

The increasing prevalence of such regrettable situations as those which have been described is being recognized and deplored by the growing body of citizens who are wishing and working for well planned and beautiful cities. While there is a constantly widening conviction that the city's power to protect its public works from disfigure-

ment and injury should not stop at street or park lines, but should reach to some extent the adjoining private property, there is, however, no substantial agreement as to just how the city should exercise this control. Those who urge excess condemnation as the only adequate solution of the problem find themselves, therefore, under the necessity of defending their plan against the competing claims of at least two rival schemes.

The first, and in some ways the simplest plan for the public control of the property surrounding an improvement, is by the exercise of the police power, the general power of the state or city to protect the health, safety and convenience of its citizens. The police power is based upon the law of public necessity — the paramount claims of the community over those of private individuals. It is an elastic power — ever broadening in scope, ever deepening in intensity. Control for which there is doubtful public necessity today may seem imperative to-morrow; just as the city is at present exercising without protest many types of control over individual rights which would have been branded as tyrannical usurpation a generation or two ago. For this reason it should be remembered that American cities have probably never exhausted their resources under the police power, and that those resources bid fair to increase steadily as time goes on.[12] Professor Freund, the author of a monumental treatise on the police power, speaking at the National City Planning Conference, expressed the belief that " the police power, if not now adequate, will sooner or later be adequate for the prevention of disfigurement of improvements." [13]

[12] Shurtleff, *Carrying Out the City Plan*, Ch. V, p. 138.
[13] *Proceedings of the Third National Conference on City Planning*, 1911, p. 244.

There are three important ways in which the police power of a city might be used to protect public improvements from disfigurement and abuse. The first of these is the limitation of the height of buildings. Let American cities pass a law or an ordinance, as continental cities have done, forbidding the erection of buildings beyond a certain height. If buildings could go up no higher than the width of the street, there would always be adequate air and light and much improvement in the appearance of the thoroughfare. In the second place, let the city forbid the erection of any buildings closer than thirty or forty feet from the line of any park or boulevard. This would almost automatically exclude business houses of all kinds, and insure protection against the objectionable crowding in of houses or stores. An adequate setting for the improvement would be assured. In the third place, the city could be divided into zones or districts given over exclusively to business and industry or to homes. Thus residences could be protected against the encroachment of unsightly or inappropriate structures. Parks and boulevards could be freed from billboards and commercial buildings, while business thoroughfares would be protected from the invasion of the low-class dwelling house. It is clear that by the exercise of these three types of control the modern city could do much to protect its improvements from injury and disfigurement.

The first objection raised to the use of the police power for these purposes is that in so far as they attempt to afford an esthetic protection they are under the ban of unconstitutionality. It is a well-established rule of law, in American states, that ugliness cannot be abated as a nuisance. In the words of Professor Freund, " the various forms of offensiveness over which the police power is exercised do not as yet include unsightly ob-

jects."[14] The attitude of our courts on this point is well summed up in the somewhat eloquent words of the Supreme Court of Illinois:

> The citizen has always been supposed to be free to determine the style of architecture of his house, the color of paint he puts thereon, the number and character of trees he will plant, the style and quality of clothes that he and his family will wear, and it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in this and other like matters; although the highly cultured may find, on every street of every town and city, many things that are not only open to criticism but shocking to the esthetic taste. The courts of this country have, with great unanimity, held that the police power cannot interfere with private rights for purely esthetic purposes.[15]

Without entering into any extended discussion of the constitutional problem here raised, it may be suggested that there are three considerations which tend somewhat to break the force of this constitutional objection. The first is that the three ways in which it is proposed to use the police power for protecting public improvements certainly do not aim at esthetic protection exclusively and probably not even primarily. In the second place, there is reason to believe that the view of the courts may gradually be liberalized on this point, to permit the control through the police power of the grosser forms of ugliness.[16] And lastly, the barrier of unconstitutionality is

[14] *Police Power*, p. 162.

[15] The Haller Sign Works *vs.* Physical Culture Training School, 249 Ill., 436 (1911).

[16] This is certainly implied in the statement of Professor Freund, "It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further applications." *Op. cit.*, p. 166.

never permanently impassable, since constitutional amendments can always break down those barriers.

A much more serious objection to the use of the police power for these purposes lies in the fact that it does not adequately meet the whole situation. Without discounting its effectiveness and value, as far as it goes, it is fair to say that the results it can produce are, at best, negative and not positive. It may prevent the erection of structures which are positively objectionable, but is unable to exercise any direct and constructive power to compel the property adjoining an improvement to be used for the purposes which are most appropriate and beneficial. In a majority of cases, the negative power which the city might thus exercise through its police power would perhaps be adequate for the city's needs. There would be many instances, however, in which these negative measures would not afford an adequate degree of protection.

The city never pays damages for any interference with private rights resulting from an exercise of the police power. The owners of the property abutting on a park or pleasure drive would be subjected to the types of control just mentioned as to height of buildings or frontage lines, without receiving any compensation for these limitations upon the use of their property. This point in itself has called out serious protest against any thoroughgoing use of the police power as a city planning instrument, and has led to the proposal of another method of accomplishing the same end which is less subversive of private property rights. This is the plan of taking, by right of eminent domain, easements in the land adjacent to a public improvement. In other words, the city would condemn and pay for the right to impose upon the neighboring owners such restrictions as under the police power it would impose without the payment of compensa-

tion, and even those which were more severe. An easement is merely a right or privilege affecting the use of a piece of land either giving the right of use to another or limiting the owner's right to use in a certain way. The city of Boston, for instance, took by eminent domain the right to limit the height of the buildings on Copley Square to ninety feet. The owners received a sum of money and gave up in return the right to build skyscrapers on their land.[17] A recent statute confers upon the park commissioners of the larger cities in Indiana the right to condemn easements of a slightly different character. This law provides for the establishment of a "line determining the distance at which all structures are to be erected upon any premises fronting upon any park, parkway, or boulevard" and allows the cities to "acquire by condemnation the right to prevent the erection of, and to require the removal of, all structures outside such lines."[18] There are one or two other states in which such laws have been passed. It is quite possible that the city could condemn an easement in the property abutting on an improvement which would require that it be used only for residence purposes or for business purposes. In fact, however, the attempts to use this method of controlling private property have been so few in number and so limited in scope that it is rather hard to determine to just what lengths the policy could be pushed if the city were intent upon making it a really effective means of protecting public improvements. It is probably fair to say that there are undiscovered possibilities in such a method of procedure. It is urged by many that the condemnation of easements can do all that excess condemna-

[17] The constitutionality of this proceeding was upheld in Attorney-General *vs.* Williams, 174 Mass., 476 (1899).
[18] Laws of 1911, Ch. 231.

tion can do in the way of preserving the beauty and usefulness of public improvements and can do it more cheaply and simply.

The advantages claimed for this scheme are numerous and convincing. To begin with, it presents less serious legal difficulties than does excess condemnation, provided the city is scrupulous not to take by eminent domain anything which it does not directly and definitely use for a public purpose. The constitutional right of the city to condemn easements would undoubtedly be contested, but should this policy be held invalid, then there would seem to be little hope of sustaining the more radical policy of excess condemnation.

A second advantage claimed for the policy of condemning easements is that it involves a less drastic interference with individual rights than does excess condemnation. It takes away no man's property *in toto*. It merely limits the use to which he may put that property. He retains title to his property, and he is paid for the privilege of the unrestricted use of it which he gives up. But under a policy of excess condemnation there may be no assurance that the owner will be allowed to keep his property even if he is quite willing to subject himself to the restrictions the city imposes upon its use. It might be taken by eminent domain and finally resold to some one else, possibly to his competitor. This is a matter of no small importance, and if the two policies are equally effective in accomplishing the purpose for which the city employs them, the taking of the easement alone would be preferred as a less serious invasion of private property rights.

In the third place, the condemnation of easements is believed by many to have definite financial advantages over excess condemnation. It is unnecessary at this

point to anticipate the rather detailed study of the financial aspects of excess condemnation which will be made in later chapters.[19] It is urged, however, that the city would need to pay far less money for an easement in an estate than for title to the estate itself, and this would make a striking difference in the initial cost of the undertaking. Many improvements might be possible at this lesser cost which would be out of the question were the city obliged to condemn large tracts of land in excess of actual needs. It is argued, furthermore, that the condemnation of an easement involves no financial risk to the city. The city has not invested in any property which it must resell advantageously in order to avoid serious loss. It has taken what it needs, paid for it, and has nothing left on its hands to be disposed of. The improvement which it has undertaken may be costly, but all that cost can be carefully estimated in advance and the whole project be quite free from any speculative risk. And finally, the mere fact that the city in condemning an easement has taken nothing which it will later sell at a profit, does not in the least preclude its adopting any one of several effective plans of recouping the cost of the improvement. There is no reason why a system of special assessments or increment taxes should not be quite as productive under this system as under any other. The city, in this case, would protect its public improvements by one scheme, and recover part of the cost by another. There is much cogency in these arguments, and those who are disposed to favor the condemnation of easements make out a strong case to show that it is a simple, safe and economical policy.

The primary criticism of the plan of condemning easements goes to the heart of the matter by denying that it

[19] *Infra*, Chs. IV, V.

can do effectively the thing for which it is designed. It may be simple, safe and economical, but it does not and cannot produce results which are thoroughgoing and satisfactory. It is not an adequate and efficient method of protecting the beauty and usefulness of a public improvement.

In the first place, such a scheme is not designed adequately to protect a public improvement in the built up part of a city. It is one thing to condemn an easement in undeveloped land in a suburban district for the purpose of preventing the erection of buildings which are too high or too near a street. It is a very different thing to alter the character and location of buildings already standing, in order to give the proper surroundings to an improvement in the heart of the city. To condemn an easement in a row of dwelling house or store lots might result in the mutilation of the buildings in such a way as to conform to the requirements, but with a most deplorable effect on the appearance of the street. And yet these improvements in the heart of the city are frequently the ones which are most in need of adequate protection. The taking of easements may be a good way of preventing the property near an improvement being put to certain obnoxious uses; it is hardly an effective method of changing the character of property which is already being used in such a way as to destroy the beauty and usefulness of a public improvement.

This suggests the second important limitation upon the plan of condemning easements. Its results are at best negative and not positive. By means of it a city may be able to prevent the adjacent property from being put to some of the more offensive uses, but it cannot compel a positive compliance on the part of the owners of such property, with a constructive plan. It may tell the prop-

erty owner that there are certain things he may not do with his property, but it cannot tell him what he must do with it. It is exceedingly doubtful, for example, if the city, after it had opened a new business thoroughfare, could condemn such an easement over the abutting property as would compel the owners to build business blocks where their houses now stand. The city might specify kinds of buildings which might not be erected, but it would be unable to require the owners to build just the sort of buildings which are needed if the city's purpose in making the improvements is to be effected. And yet it is just that kind of control which the city must sometimes exercise if it is to carry out effectively a wise and thoroughgoing plan for its own development. The condemning of easements is a preventive, not a constructive measure.

Even if it were possible for a city to condemn an easement which would permit it to compel a property owner radically to alter the character of the house or business block on his land, it would be an exceedingly costly proceeding. The city would be obliged to pay for an easement of that kind an amount nearly as great, perhaps even greater in fact, than the cost of condemning the land itself. This heavy cost would be borne by the city, and it is hard to see that, when applied to a project of this sort, the condemnation of easements possesses any special financial advantages over excess condemnation of land.

On the whole, it may be seriously questioned whether the exercise of the police power and the condemnation of easements afford thoroughly adequate means of securing to a public improvement, under all circumstances, the appropriate surrounding which it ought to have. There is no reason why they should not form part of a

city planning policy, and be utilized whenever they would be effective and satisfactory. Sooner or later, however, there is reason to believe, the city would find itself in need of the additional control afforded by the policy of excess condemnation of land.

The essential features of excess condemnation as a means of protecting the beauty and usefulness of a public improvement have already been suggested. The city condemns, in addition to what is actually needed for the street or park, as much land as it will be necessary to control in order to afford the protection which it desires. This may mean merely a row of building sites immediately abutting on the improvement, or it may mean the taking of land to a depth of from 200 to 300 feet. This surplus land the city takes in fee simple. It takes it because it wishes to resell it. It wishes it to resell it because, when it does so, it can put into the deeds of sale such restrictions as to the future use of the land as will secure to the park or highway the appropriate setting which is needed. The city holds this land in the same way in which a private citizen holds land, and there is no reason why any covenant known to the transfer of property from one citizen to another could not be made binding between the city and those to whom it sells that land. It might stipulate that the land adjoining a park or boulevard should be used only for residences of a certain price, that they should be placed a reasonable distance from the street and from each other, that they be built of brick or stone and should not in any case be higher than two-thirds or three-fourths the width of the street in front of them. It could in like manner provide that the lots fronting a newly opened thoroughfare designed for business purposes should have erected on them only buildings of a certain quality, size and height. The city

is not obliged to sell these lots. When it does sell it can sell upon its own terms. In this way the city may directly and adequately protect any public improvement, no matter how unattractive its previous surroundings have been.

The earliest attempt in the United States to confer upon cities the power of excess condemnation, for the purpose of protecting public improvements, was made by the state of Ohio in the well-known Municipal Code of 1902. This statute provided that municipalities should have special power to "appropriate, enter upon and hold real estate within their corporate limits" for a variety of purposes. One of these purposes was

> for establishing esplanades, boulevards, parkways, park grounds and public buildings, and for the purpose of reselling such land with reservations in the deeds of resale as to the future use of such lands so as to protect public buildings and their environs, and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto.[20]

Some dozen or fifteen constitutional amendments or laws, embodying substantially the same power, have been enacted or proposed in various states since that time,[21] and although they all follow the same general lines, no two of

[20] Code of 1902, amended 1904 and 1908. Incorporated into General Code of Ohio 1910, Vol. I, p. 787, No. 3677, Par. 12.

[21] Maryland Laws of 1906, Ch. 397; Laws of 1908, Ch. 166; Model Charter of National Municipal League, 1915; New York Laws of 1911, Ch. 776; New York Laws of 1915, Ch. 593; Ohio Constitution, Art XVIII, 1912; Oregon Laws of 1913, Ch. 269; Pennsylvania Laws of 1907, No. 315; Proposed amendment to Constitution of Pennsylvania, Art. IX, Sec. 16, 1915; Proposed amendment to Constitution of California, Art. XI, Sec. 20, defeated in 1914 and 1915; Virginia Laws of 1906, Ch. 194; Wisconsin 1909, Chs. 162, 165; 1911, Ch. 486; Laws of 1912, Art XI. See *infra*, p. 218ff.

them are exactly alike. There is some difference, for instance, in the kinds of improvements in connection with which this power can be exercised. Some states provide for its use in connection with any public improvement which the city may undertake. The Pennsylvania law limits its use to projects for the creation or improvement of "parks, parkways and playgrounds" while the Maryland statute specifies "esplanades, boulevards, parkways, playgrounds, public reservations around public buildings." A special statute of 1911 provided for the application of excess condemnation in connection with the improvement of the waterfront facilities of the city of New York and the creation of "terminals, ways or stations." In most cases these provisions have been enacted with some specific improvement in view, but in the more recent enactments there seems to be less and less tendency to limit the kind of public improvement which the city is authorized to protect by means of excess condemnation.

In a few instances, also, the city is limited in respect to the amount of lands which it may condemn in excess of its actual needs. The Pennsylvania and Oregon statutes specify that neighboring private property within two hundred feet of the boundary lines of the improvement may be appropriated by the city. A proposed amendment to the New York constitution presented in the convention of 1915 provided that "the excess shall be no more than sufficient to form suitable building sites abutting on such park, street, highway or public place." [22] In some instances, however, no limitation of this kind is placed on the city, which is thus left free to condemn in excess as much land as is necessary in its judgment in order adequately to protect the improvement.

[22] New York Constitutional Convention, *Proposed Amendments*, Vol. II; proposal 512, June 9, 1915. Not adopted by Convention.

The kind of restrictions which may be imposed upon the future use of the land which the city resells will, of course, vary with the character of the improvement and the purpose for which it was constructed. In those cases where excess condemnation may be utilized in connection with any kind of public improvement, the law will usually provide that such restrictions may be imposed as will protect and further the improvement. Thus no limit whatever is placed upon the discretion of the city authorities in this matter. Where, on the other hand, the use of excess condemnation has been limited to the protection of certain kinds of improvements, like parks, parkways and boulevards, there has been an attempt to map out in general terms at least the character of the restrictions which are to be imposed upon the surplus land. The Pennsylvania law, for instance, stipulates that cities may

> resell such neighboring property, and with such restrictions in the deeds of resale in regard to the use thereof as will fully insure the protection of such public parks, parkways and playgrounds, their environs, the preservation of the view, appearance, light, air, health and usefulness thereof.

The Virginia act of 1906 allowed the city to resell the surplus land, " making limitations as to the uses thereof, which will protect the beauty, usefulness, efficiency or convenience of such parks, plots or property," while the New York statute seeking to protect waterfront and terminal facilities provided for the resale of the land not needed under restrictions which would tend to promote access to or use of the improvement.

It will be noticed that in none of these cases are the hands of the city so tied as to prevent the imposition on the future use of such surplus property of any restric-

tions which the city might deem suitable for the accomplishment of its purpose. It is quite probable, however, that laws providing for the use of excess condemnation as a means of protecting public improvements will continually grow broader and more general in character, at least in respect to the kinds of projects in connection with which it may be used and the types of protective restriction which may be imposed.[23] This newer type of excess condemnation provision is exemplified in the proposed amendment to the constitution of Pennsylvania passed by the legislature of 1915. The fact that it is the newest as well as the broadest provision on the subject justifies its quotation in full.

> The State, or any municipality thereof, acquiring or appropriating property or rights over or in property for public use, may in furtherance of its plans for the acquisition and public use of such property or rights, and subject to such restrictions as the legislature may from time to time impose, appropriate an excess of property over that actually to be occupied or used for public use, and may thereafter sell or lease such excess and impose on the property so sold or leased any restrictions appropriate to preserve or enhance the benefit to the public of the property actually occupied or used.[24]

While this proposed amendment is in itself exceedingly broad, it is to be noted, however, that it expressly authorizes statutory restrictions.

[23] The city will, of course, always be under certain practical limitations as to the kind of restrictions to which the future of surplus property may be subjected by reason of the fact that it wishes to sell that surplus. It is shown, at a later point in the discussion, that the character of these restrictions directly affects the marketability of the land. *Infra*, p. 207ff.

[24] Proposed amendment to Article IX of the Constitution, Sec. 16. Proposed in legislative session of 1915 and must be passed by the next legislative assembly before being submitted to the people.

All of the statutes and constitutional amendments thus far discussed seem to have been drafted for the exclusive purpose of enabling a city to restrict the future use of property condemned in excess.

There is a more numerous class of enactments authorizing excess condemnation which do not require the imposition of restrictions upon the land which the city resells, but definitely permit the city to sell such land with or without such restrictions. These provisions contemplate the use of excess condemnation as a means of replotting remnants of land and recouping the cost of the improvement as well as of protecting the improvement, and in case these purposes could not all be effectively accomplished, the city is given its choice as to which one it will further. If the imposition of restrictions upon the use of the land resold would make the undertaking less profitable financially, the city need not impose such restrictions. It is given discretion to decide whether there shall be any restrictions and what kind they shall be if they are imposed.

This is also the case in England. English cities have employed excess condemnation for purposes of recoupment in special instances for many years, apparently without thought of furthering any social or esthetic purpose in that way. The more recent parliamentary enactments enabling cities to condemn land in excess, while not requiring the imposition of restrictions upon the future use of the surplus land, have, however, frequently authorized such restrictions should they prove necessary or desirable.[25]

[25] London County Council (Improvements) Act 1899, 62 and 63 Vict., Ch. cclxvi, Sec. 33; London County Council (Tramways and Improvements) Act 1901, 1 Ed. 7, Ch. cclxxi, Sec. 52; Mall Approach (Improvement) Act, *Parliamentary Papers,* 1914, Vol. viii, Bill 259.

Frequently constitutional amendments providing for excess condemnation contemplate the passage of enabling statutes by the legislature. The constitutional provision of the state of New York made no reference to protective restrictions upon surplus land, but the legislature in the special act conferring the power on the city of New York provided that such restrictions might be imposed upon the deeds of resale of the surplus land as seemed advisable to the Board of Estimate and Apportionment.[26]

As a rule, however, the legislature does not give the city the right to impose restrictions unless the constitution sanctions it.[27] In fact, the legislature of Massachusetts, in one case at least, did not authorize by statute the imposition of such restrictions by the city, even when the constitutional provision under which the law was enacted stated that they might be imposed.[28] There is some question whether a city could impose these restrictions in the absence of express authorization by either the legislature or the constitution. It is more than likely that under the general rule of strict construction of municipal powers they would be held not to have such powers, although no court has, as yet, been called upon to decide the question. It is not necessary to enter into further discussion of these excess condemnation measures which make optional the imposing of protective limitations upon the future use of the surplus land. They are more properly classified as enactments designed for recoupment

[26] New York Constitution, Art. 1, Sec. 7; New York, Laws of 1915, Ch. 593.

[27] New York, 1914, Ch. 300.

[28] Massachusetts Laws of 1913, Ch. 778. See however Laws of 1912, Ch. 186, and Laws of 1913, Chs. 201, 326 (City of Worcester) and Laws of 1913, Ch. 703 (City of Salem), where such restrictions were authorized.

rather than protection of improvements, and as such they will be considered in a later chapter.[29]

While the enactments authorizing the use of excess condemnation for the purpose of protecting public improvements are rather numerous, the attempts to use that policy have been very few. This is true of foreign countries as well as of the United States. Public improvements are for the most part adequately protected in the cities on the Continent, but that protection is secured through other means than excess condemnation.

It is probably true that there is no instance in which an English city has undertaken an excess condemnation project for the primary purpose of protecting a public improvement by restricting the uses to which the neighboring land may be put. The motive for such undertakings has always been admittedly financial and for many years the attempt has been made to make excess condemnation do in many cases for the cities of England what special assessments do for the cities of the United States.[30] There developed a feeling, however, that to construct a costly improvement and after acquiring the adjoining land to relinquish it without placing any limitations upon the uses to which it might later be put, was a shortsighted and wasteful policy. Evidence was presented to the Royal Commission on London Traffic in 1903, to show that some improvements in the city of London had been well-nigh ruined because of the failure of the authorities to exercise any control over the adjacent property. Other improvements, it was alleged, were saved from a

[29] *Infra*, p. 133ff.

[30] Although the betterment tax originated in England, it early became unpopular and sank into disuse. Seligman, *Essays in Taxation*, p. 434.

similar fate only by good fortune.[31] In 1899, Parliament passed the act authorizing the construction of the famous Holborn-to-the-Strand improvement. A somewhat detailed study of this project will be made in a later chapter, but it is interesting in this connection to note that the county council was empowered to lease or sell such surplus lands as it deemed expedient, subject to restrictions as to their future use. The power to impose these restrictions was exceedingly broad, and under it the lessee or buyer of the excess land could be made to agree to the erection of buildings "of such size or class and upon such plan and elevation, and of such height and of such stories as the Council shall think proper." [32] The county council proceeded to avail itself of the power thus to control the kind of buildings which were to front the new thoroughfare. Prominent architects submitted plans showing the type of structures which ought to be built, and the county council proceeded to offer the abutting lands for lease or sale to those who would agree to erect on them the buildings thus designed. So rigid, in fact, were the requirements imposed upon prospective purchasers or lessees, that the county council experienced a good deal of difficulty in disposing of the property. The restrictions were accordingly modified so as to make them less severe, with the consequence that it was much easier to make a satisfactory disposition of the surplus land.[33] A similar power to impose minutely detailed restrictions upon the future use of surplus property has been granted from time to time to the county council

[31] Report of Royal Commission on London Traffic, *Parliamentary Papers,* 1906, Vol. xliii, Question 23904, page 876.

[32] London County Council (Improvements) Act 1899, 62 and 63 Vict., Ch. cclxvi., Sec. 33.

[33] *Annual Report of the Proceedings of the London County Council,* 1908, pp. 164–165.

since the act of 1899, and the statute recently enacted by Parliament providing for the construction of the $5,000,-000 approach to the Mall in London, carried with it an almost identical provision authorizing restrictions upon the adjoining property when it should be leased or sold.[34] The English Government seems to be increasingly impressed with the advantage of making excess condemnation serve as a means of protecting the beauty and usefulness of a public improvement as well as a means of paying for it.

The experience which American cities have had with excess condemnation as a means of protecting improvements has also been exceedingly limited. There has been some disposition to enact statutes or to adopt constitutional amendments authorizing the use of this policy, but there has been little disposition to test out those powers in any thoroughgoing fashion. No city in the United States has as yet put through successfully a project of this kind.

Reference has already been made to the fact that in 1909 and 1910 there had been considerable agitation in behalf of the construction of a large business thoroughfare to connect the North and South Stations in the city of Boston.[35] The Commission on Metropolitan Improvements, appointed by the Massachusetts legislature, made a preliminary report on the subject in 1909 and convinced the legislature of the necessity of making the improvement. In this report the commission stated that while the Remnants Act of 1904 [36] would be of some help in the protection of the improvement, it did not authorize as large excess takings of land as would be necessary to

[34] Mall Approach (Improvement) Act, 1914, *op. cit.*
[35] *Supra*, p. 63ff.
[36] *Supra*, p. 62ff. Acts of 1904, Ch. 443.

insure the adequate and early development of the improvement for business purposes. In view of the serious doubts entertained as to the constitutionality of a law which permitted these more extensive takings, the commission urged that the opinion of the Supreme Court upon that point be requested since "upon their opinion may depend the determination of the question whether such a highway as that herein referred to should be laid out." [87]

The legislature, accordingly, sent to the Supreme Court of the state a request for an advance opinion upon the constitutionality of making this liberal application of the power of excess condemnation. The wording of this request indicates the character of the undertaking which the legislature had in mind. After setting forth that the thoroughfare is needed, that the industrial and commercial interests of the city are hindered by the lack of it, that such a thoroughfare cannot be created by laying out a new street under powers conferred by existing statutes, the legislature goes on to inquire:

If the legislature is of opinion that said facilities can only be secured by the obliteration in whole or in part of the present lines of individual ownership along any such thoroughfare as may be laid out and constructed, the concentration through the exercise of the power of eminent domain of such abutting estates in parcels of suitable size and shape, the laying out of rear streets, and the development and use of such parcels, under such restrictions as the public authorities may prescribe, for warehouses, mercantile establishments and other buildings suited to the needs of trade and commerce as now carried on in other parts of the world, . . . is it within the constitutional power of the legislature to authorize the

[87] *Preliminary Report of Commission on Metropolitan Improvements,* Jan. 1, 1910, (Senate Document, No. 27), p. 10.

city of Boston . . . to lay out such a thoroughfare and rear streets, and to take not only the land or easements necessary for the same, but also such quantities of land on either side of said thoroughfare or between the same and said rear streets, as may be reasonably necessary for the purpose hereinbefore set out, with a view to the subsequent use by private individuals of so much of that property taken as lies on either side of said thoroughfare, under conveyances, leases or agreements which shall embody suitable provisions for the construction on said land of buildings suited to the objects and purposes hereinbefore set out, and for the use, management and control of said lands and buildings in such manner as to secure and best promote the public interests and purposes hereinbefore referred to? [38]

For reasons which need not here be enumerated the Supreme Court of Massachusetts replied that such a law would be unconstitutional.[39] Accordingly, the legislature proposed a constitutional amendment permitting the legislature to authorize public authorities to condemn land in excess

provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor [the legislature] may authorize the sale of the remainder for value with or without suitable restrictions.[40]

This amendment was ratified at the polls in 1912, but while several acts have since been passed conferring the power of excess condemnation which it authorized upon

[38] Opinions of Justices, 204 Mass., 607 (1910).
[39] *Idem*, p. 615.
[40] Constitution of Massachusetts, Art. 10, Part 1.

other cities in Massachusetts,[41] no attempt has been made to apply it to the city of Boston. The business thoroughfare, the agitation for which gave birth to the amendment, has never been furthered by the exercise of any of the powers which that amendment authorizes. Just how the Massachusetts amendment will operate when applied for the protection of public improvements remains a matter of conjecture.

There is another case in which a plan to employ excess condemnation so as to control property adjacent to an improvement has been strongly advocated. It has been urged that the city of New York use this power for the development of wharves and docks on the waterfront and for ensuring easy access to such terminal facilities.[42] In 1911, a law was passed conferring upon the Board of Estimate and Apportionment the power to use excess condemnation in this way. The relevant portion of the law reads as follows:

And provided further, that the areas of land to be so acquired for the purposes of this act may include such area, additional and adjacent to that required for the structure of such terminals, ways or stations as said Board of Estimate or Apportionment may authorize and certify as required to be replotted, regraded or otherwise adapted for convenient access to and use of such ways or stations or other improvement of the waterfronts of said city in connection therewith; and that such area not required for such structure, but which may have been so acquired, after the same shall have been so replotted, regraded or otherwise adapted for such access, or rear

[41] *Infra*, p. 232ff. Analytical table of statutes. None of these cities have used the power of excess condemnation for the protection of improvements.

[42] Report of Commissioner of Docks and Ferries, 1910, on "The Jamaica Bay Improvement"; 1911, "Organization of South Brooklyn Waterfront."

improvement, may be disposed of by the city, subject to such restrictions as said board may see fit to impose thereon to promote such access or use or to effect such improvement.

No use has ever been made of the power conferred by this act.[43] There is one instance, however, in which the effort of an American city to use excess condemnation for the protection of an improvement was not confined to paper. This is the case of the famous Fairmount Parkway improvement begun in the city of Philadelphia in 1907, and since no other actual attempt has been made in this country to employ excess condemnation on a large scale for the protection of improvements or for any other purpose, the history of this project may be described in some detail.

The demand for the construction of this improvement was in large measure created and directed by the efforts of the Art Federation of Philadelphia and the Fairmount Park Art Association. These organizations were entirely unofficial and devoted their energies to furthering the artistic development of the city and especially to creating an adequate system of parkways and boulevards. Their ideas gradually crystallized into a definite plan for the construction of a parkway of imposing lines to extend from Fairmount Park to the City Hall, a distance of about a mile and a quarter. Accordingly in 1903, after considerable discussion, the city council placed Fairmount Parkway on the city plan. The next few years were given over to somewhat abortive efforts to get this important undertaking under way. There was a good deal of juggling with the lines of the parkway itself. There were more or less unsuccessful

[43] Laws of 1911, Ch. 776.

efforts to make terms with the owners of the property which the city would need to take; there was much voicing, by the mayor and others, of profound dissatisfaction with the road jury system of awarding damages for condemned land; there was a growing conviction that the project could not satisfactorily be put through without the grant of new powers by the legislature. In 1907 the work of construction was begun, and in the same year the legislature passed a law giving to the cities of the state the right to use excess condemnation for the protection of improvements. Under this act the power was given to

> purchase, acquire, enter upon, take, use and appropriate neighboring private property within two hundred feet of the boundary lines of such property so taken, used and appropriated for public parks, parkways and playgrounds, in order to protect the same by the resale of such neighboring property with restrictions.[44]

This surplus property might then be resold by the city

> with such restrictions in the deeds of resale in regard to the use thereof as will fully insure the protection of such public parks, parkways and playgrounds, their environs, the preservation of the view, appearance, light, air, health and usefulness thereof.

It will be noted that this statute authorized a city to acquire property in excess of its actual needs either by purchase or by condemnation. The city of Philadelphia proceeded therefore to acquire as many of the properties adjoining the proposed improvement as it could by private contract, without resorting to the more drastic power of eminent domain. The actual construction of the parkway

[44] Laws of 1907, No. 315.

itself went forward with fewer delays than before, and the city was able to buy a good deal of the adjacent land which it wished to control. In 1909, a Permanent Committee on Comprehensive Plans was created by the city council and in 1912 this body proceeded to appoint a subcommittee to deal with the problem of the " further planning, maintenance, development of the parkway on a high standard and the preparation of proper and adequate legislation regulating the height, character and type of construction, and the purposes and uses of buildings to be constructed on the line of the parkway." [45] Later in the same year the condemnation of a large section of land abutting on the parkway was definitely authorized by ordinance and the city proceeded to take the excess lands thus specified.[46]

The vigorous action thus determined upon, however, was soon to be brought to a halt. In January, 1913, the city council passed an ordinance authorizing the mayor to enter into a contract with the Bell Telephone Company, whereby a large plot of the excess land taken by the city was to be sold to the company subject to certain building restrictions.[47] The Bell Telephone Company was to pay ninety per cent of the cost of acquiring the property by condemnation. The company planned to erect a large and attractive office block and the purpose of the transaction was to make possible the building of so appropriate a structure and to prevent the use of the property for unsightly or objectionable purposes. The land which the city thus sought to sell comprised, among other parcels, two lots owned by the Pennsylvania

[45] *Report of the Permanent Committee on Comprehensive Plans*, 1912, p. 743.

[46] Ordinance July 3, 1912.

[47] Ordinance Jan. 16, 1913.

Mutual Life Insurance Company and occupied by three-story brick buildings. This company declared itself ready to improve its property in accordance with any restrictions which the city might impose on it and denied the right of the city to condemn the land in question. It alleged that the city was actually taking its property in order to reconvey it to the Bell Telephone Company and such an exercise of the right of eminent domain was in violation of the constitution of Pennsylvania and of the United States. The validity of the act of 1907 and the ordinances of July 3, 1912, and January 16, 1913, was thus put squarely before the court, and after being upheld by the district court,[48] the excess condemnation provisions were declared by the Supreme Court of the state to be unconstitutional and void.[49]

The decision which took away the city's power of excess condemnation of land did not, however, interfere with the city's power to purchase excess land. This power the city has continued to exercise until at the present time all but about 160 of the 1000 parcels which the city desired to take have been acquired. It was still felt, however, that the success of the project was seriously prejudiced by the inability of the city to control adequately the development of the property immediately adjoining the parkway. As a temporary measure, therefore, a statute was passed in 1915 authorizing cities of the first class to regulate the location, size and use of

[48] Pennsylvania Mutual Life Insurance Co. *vs.* City of Philadelphia, 22 Pa. Dist. Reports 195. The district court sustained the statute but issued an injunction against the sale of the land on the ground that the ordinance did not specify the restrictions which were to be imposed, as was required by the law of 1907.

[49] Pennsylvania Mutual Life Insurance Co. *vs.* City of Philadelphia, 242 Pa. St. 47 (1913). *Infra,* p. 300ff. for a discussion of the legal principles involved.

buildings and giving to the Fairmount Park Commission the right to say what buildings may or may not be constructed within two hundred feet of any park, parkway or other public place under its care and management, together with architectural supervision over such buildings.[50] In the meantime the city has refused to accept the decision of the Supreme Court as a permanent bar to the use of excess condemnation, and the constitutional amendment quoted above has been passed by one legislature.[51] If passed and approved also by the legislature next elected it will be submitted to the people for their approval or rejection.

These somewhat abortive efforts to protect public improvements by means of excess condemnation may not constitute successful precedents for that policy but they do not, on the other hand, indicate that it is inherently unworkable or injurious. Experiments such as these hardly justify settled conclusions of any sort regarding the scheme itself, and one is obliged to form judgments which are perhaps largely *a priori* regarding its real merits.

There are two grounds upon which the use of excess condemnation for this purpose may be attacked. The first of these is the ground of serious financial risk. The plan is likely to be exceedingly costly and highly speculative in character. The city must pay for all the property which it condemns, and the fact that it hopes to resell or lease what it does not actually use does not in the least lighten the initial burden of getting the improvement under way. In order to recover the amount

[50] Laws of 1915, No. 175. All this is to be done by the city in the exercise of its police power. As has been indicated above, p. 88ff., the weight of authority would seem to be against the validity of so liberal an extension of the police power.

[51] *Supra*, p. 100.

which it paid for the land it desires to control, the city must dispose of that land profitably. It must not only dispose of it profitably, but must also dispose of it subject to such restrictions as will adequately protect the improvement. It will be shown, at a later point, that the imposition of these restrictions may in some cases limit the market for the land so restricted and thereby lessen the city's chance of disposing of such land at a profitable figure. Add this risk to the risk which everybody necessarily incurs when he buys land with the hope of reselling at a profit, and one may conclude that excess condemnation for the protection of improvements involves the city in a speculative venture of no mean proportions. The opponents of this policy urge that this financial risk should influence cities to seek a safer and more economical means of controlling the property surrounding public improvements.

The second objection urged against this policy has already been mentioned in connection with excess condemnation as applied to remnants of land; namely, the drastic interference with the rights of individual property owners. It is alleged that the results which can be expected from this scheme do not warrant this interference. Property rights are too sacred to be juggled with carelessly; the fact that the appearance of a man's property, legitimately used, does violence to the idea which a group of city officers hold as to how the property abutting a park or pleasure drive ought to look or be used, does not justify taking that property away from him and selling it to some one else.

Those who advocate excess condemnation for protecting improvements meet these objections directly. In their opinion the adequate protection of a public improvement from injury or disfigurement is a purpose for which

it is proper to resort to as severe an invasion of private property rights as may be necessary. It is just as legitimate to take a man's property in order to protect an improvement as it is to take it in order to create an improvement. There is no other effective way of securing the adequate protection of parks or highways than by condemning the abutting land and later reselling it subject to appropriate restrictions as to its further use. In other words, excess condemnation affords the only effective means of achieving a public purpose which, in their opinion, is highly necessary. Not only can one justify, therefore, the interference with private property rights which it entails, but one can also justify whatever outlay of money may prove to be necessarily incident to the successful application of the policy. The financial expediency of making an expenditure for a necessary municipal improvement does not depend upon the amount of money paid out. It depends upon whether the city receives a fair return in value for what it pays. If the city is able to prevent the abuse and disfigurement of a valuable improvement only by the exercise of excess condemnation, it should not grumble if that protection comes at a high price and entails financial risk. Nor should property owners complain because they are obliged to give up valuable rights for the common interest. In a matter so vital to the welfare of the whole community, the city cannot afford to be niggardly with its money nor squeamish about sacrificing individual privileges and immunities to the common advantage of the city.

It is scarcely necessary to reiterate the statement that no more drastic invasion of private rights is justifiable than is fairly demanded by the paramount interests of the community. It is indefensible to step wantonly or carelessly beyond this limit. Most of the American pro-

visions which embody the power to use excess condemnation for the protection of public improvements are open to a possible criticism on this ground. These laws provide that property may be condemned in excess of the actual needs of the city and may then be resold subject to suitable restrictions as to future use. The city is not obliged to sell this land to any particular person or at any particular price. In the Philadelphia project already described, the city entered into an understanding to resell a parcel of surplus property to a corporation even before it had actually secured title to the land. This it did in spite of the expressed willingness of the original owner to retain possession of his property on the same terms and subject to the same conditions which the city had stipulated in conveying it to his rival.[52] This would seem to the ordinary mind to be unfair, and there is little question that this unfairness impressed itself upon the Supreme Court of Pennsylvania and had no small weight in leading them to feel that the whole policy of excess condemnation was a rather wanton scheme, by which the city took a man's property away from him and transferred it to some one else. It is hard to see how the city gains by having the property which abuts an improvement change hands. It is interested only in exercising over that property the control necessary to protect the improvement from injury or disfigurement. That control need not be less effective because Smith owns the property than it would be if Jones owned it. Nor would the protection accorded the improvement be less adequate because the man who owns the restricted property is the same man who owned it before the improvement was created. If, therefore, the owner of property which abuts an improvement wishes to retain his orig-

[52] *Supra*, p. 111.

inal site or secure it again, there seems to be no reason why the city should not be compelled to allow him the privilege of buying back his property subject to the restrictions which the city deems it advisable to place upon its subsequent use. Such an owner would be obliged to pay for the property he formerly owned an amount equal to the highest offer tendered to the city when the property was offered for sale. In this way the city would secure the increment of value created by the improvement it has made, would secure for that improvement the protection which it needs, and at the same time would not be guilty of ousting a man from the property which he owns and which he is ready and willing to pay for the privilege of retaining. While such a policy would not lessen the effectiveness with which the city furthers its own interests, it would appeal to every property owner's sense of fair play. Such a provision has never yet been put into practice in this country, but the recent amendment to the constitution of Rhode Island approved by the people at the November election, 1916, contains such a stipulation. After providing in the ordinary manner for the resale or leasing of property not required for actual needs, the clause goes on to state that, "in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same, upon such terms as the state or city or town is willing to sell or lease the same." [53]

There seems little doubt that if excess condemnation were employed under such a restriction, it would meet with far less criticism and call out much heartier coöperation and support than it will without this prudent safeguard to private rights. With such a provision attached,

[53] Amendment creating Art. XVII.

it is fair to say that excess condemnation will in many cases be found to afford the fairest, most effective, most economical means of protecting public improvements by controlling the development of the neighboring property.

CHAPTER IV

EXCESS CONDEMNATION FOR RECOUPMENT OR PROFIT

In the foregoing chapters, excess condemnation has been examined and evaluated, not so much as a financial measure as a direct and effective means of solving certain city planning problems, of serving highly important social and esthetic ends. The control which it affords over remnants of land or over the property which surrounds a park or boulevard is valuable in itself, may, in fact, be necessary, quite irrespective of the cost of exercising that control. Excess condemnation frequently offers the only really effective method of doing certain things which must be done. If it proves to be a more expensive method, that expense is to be viewed philosophically. In the happy phrase of Flavel Shurtleff, "it is a bill for surgical services, and the size of the bill cannot affect the need of the operation." The city can afford to pay well for the protection secured for the beauty and usefulness of its public improvements through a judicious exercise of the power of excess condemnation.

The argument, however, which the advocates of this policy very frequently advance, an argument for excess condemnation quite irrespective of the purpose for which it is used, is that it offers a safe and effective method of paying for public improvements.

Even when excess condemnation is used to replot remnants of land, or when it is used to prevent the injury or disfigurement of parks, public buildings or thoroughfares,

the expectation of a profitable resale of the surplus land is always present as an incidental motive for employing the scheme. It is urged that a city is doubly justified in using a policy which accomplishes these valuable results and which, at the same time, pays its own way or even brings in a substantial surplus.

If the hope of making money constitutes a strong secondary motive for advocating the types of excess condemnation projects which have already been discussed, it forms the sole motive for the use of that policy in a much greater number of instances. The constitutional amendments, statutes or decrees which authorize the use of excess condemnation merely as a means of paying for a needed public improvement are more common than any other kind. It is the purpose of this chapter to study excess condemnation as a money-making or money-saving device, to outline the provisions in the enactments in which its use for that purpose is authorized, to describe the projects in which it has been so used and to compare it briefly with other schemes for achieving the same end.

It has already been seen that as an effective and equitable means of paying for public improvements excess condemnation is not without rivals, and that these other policies are also based upon the principle of securing for the city some or all of the increment of value which, by the construction of the improvement, it creates. Viewed from the standpoint of pure theory it has already been indicated that the two leading competitors of excess condemnation as a financial device, special assessments and increment taxes, necessitate a less drastic interference with private property rights than does excess condemnation. The burden of proof thus rests upon the proponents of excess condemnation, to show that that policy

is so much more efficient in operation and satisfactory in results that it justifies this additional invasion of individual privileges and immunities. To arrive at any final conclusion as to the relative merits of these different financial policies it is necessary to study them, not only as they actually operate, but also as they may, under most favorable conditions, be fairly expected to operate.

Before giving further consideration, therefore, to excess condemnation as a money-making device, it will be worth while, for purposes of comparison, to indicate briefly the general character of the results which can be obtained by the efficient application of the two policies of levying special assessments and increment taxes. Even in the very brief summary of these points which is here possible, a fairly clear notion may perhaps be given of their practical limitations and advantages.

In considering the financial results of even the most effective operation of the special assessment plan, it is most important not to lose sight of the fundamental limitation which, by long settled practice, restricts the scope of that policy. This has already been mentioned [1] and is, of course, the limitation of the total amount which can be collected in special assessments to the cost of the improvement which the city has undertaken. If the measurable benefits accruing to the property adjacent to an improvement do not equal the cost of that improvement, the city cannot assess the entire cost on such owners, since property can be assessed only to the extent to which it is actually benefited.[2] But often the benefits exceed the cost of the improvement, and in that

[1] *Supra*, 18ff.

[2] Courts and commentators unanimously agree that the assessment must be limited to the actual amount of benefit conferred. An elaborate discussion of this principle, with exhaustive citation of cases, will be found in Hamilton, *The Law of Special Assess-*

case the property is permitted to retain an increment of value created by the city's money, an increment which might otherwise constitute a substantial profit to the city. The city is content if its books balance and is not inclined to begrudge a man an unearned increase in the value of his property, so long as that increase costs the city nothing.

A further limitation which is sometimes imposed upon the levying of special assessments is the restriction of the zone of assessment to the property actually abutting on the improvement.[3] The man around the corner may really profit from the opening or improvement of a street quite as much as some one whose property is actually contiguous to the street line, but according to the frequent practice of many states he need bear no direct share of the cost. His property, so far as that improvement is concerned, is free from assessment. This seems to be due to the fact that in levying special assessments it is customary to proportion the charge laid on any owner to the amount of the frontage he owns.[4] As soon as an attempt is made to assess property not abutting on the improvement, this convenient guide is unavailable and the task of equitably measuring the benefits properly chargeable to such nonabutting property is one which the average local governing body might find somewhat perplexing.

Since nonabutting property owners, however, are in

ments, pp. 180–205. Many cities assess noncontiguous property when benefited.

[3] This is a statutory restriction, and in the absence of statute nonabutting property may be assessed. Paige and Jones, *Taxation by Assessment*, Sec. 619, citing cases.

[4] Where the front-foot method of assessment is employed nonabutting property is exempt. *Cooley on Taxation*, p. 1223, citing cases.

many cases actually benefited by the creation of an improvement, it would be manifestly unfair to compel the abutting property owners to pay the entire cost of that improvement. There is, furthermore, a community benefit resulting from a street or park project, which is shared by every one in the city to a greater or less extent, but which cannot be accurately measured to individuals. The consequence is that in many cases the city pays out of the public treasury a percentage of the cost of constructing the improvement, perhaps fifty per cent, and assesses the remainder only upon the abutting owners. In a number of instances the city is positively limited by law or constitutional provision to an arbitrary percentage of this kind.[5]

Such a provision is in force in the city of Boston. In 1891 the special assessment law of that city provided for a return of almost the entire cost of a public improvement. This law was later modified and the city was obliged to pay one-half the cost of every improvement[6] and the area within which the city might levy special assessments was limited to 125 feet on either side of the improved highway. In the words of Hon. James A. Gallivan, Street Commissioner of Boston, "the restriction of assessments to a radius of 125 feet necessitates the limitation of the amount assessed to 50 per cent of the

[5] The Constitution of Ohio stipulates that in no case shall any municipality levy assessments for more than fifty per cent of the cost of the private property appropriated for a public improvement. Art. XVIII, Sec. 11.

The Constitution of South Carolina has a somewhat similar provision requiring municipalities to pay one-half, or in some cases one-third, of the cost of public improvements. Art. X, Secs. 14, 15a, 16, 17.

The limitations of this kind existing in most of the states are embodied in statutes rather than constitutional provisions.

[6] Laws of 1902, Ch. 527.

cost, because it seldom happens (and then only in 40 foot residential street openings) that the benefit of the improvement within the limited radius exceeds or even equals this percentage." [7]

A restriction which is sometimes imposed upon the amount which may be taken by the city through special assessments is embodied in the provision of the New York law that no assessment for any one improvement shall be levied which amounts to more than one-half the fair value of the property. The fair value of the property is held to be its assessed value, and when property is undeveloped and is not assessed at the amount which the owners may reasonably expect to get for it, one-half of this assessed value may be very much less than the amount of the benefit which accrues to the property by reason of a public improvement, and the city is therefore prevented from securing a large portion of the increment of value which it creates and which, but for this arbitrary limitation, it might otherwise recover.[8]

In the actual process of estimating the benefit properly assessable to a property owner, there is usually a substantial cutting down of the sum which the city ought really to receive. It is the almost universal practice in this country to measure such expected benefits in advance and make up the assessment levy while the improvement is in process of construction, and certainly before the anticipated accretion in the abutting land values actually occurs. There is little doubt that the benefits thus estimated are in a large number of cases far

[7] *Proceedings of the Fourth National Conference on City Planning*, 1912, p. 62.

[8] Nelson P. Lewis, Chief Engineer of Board of Estimate and Apportionment of the City of New York, in a paper entitled "Paying the Bills for City Planning." *Proceedings of the Fourth National Conference on City Planning*, 1912, pp. 76–79.

less in amount than those which actually accrue, since it is seldom indeed that the property owners' interests in such cases are not more than adequately protected at the expense of the public purse. The amount assessed against the property abutting upon an improvement must, moreover, be offset by the amount of damages awarded for injury caused by the improvement. The same zeal to protect the individual owner which tends to make the amount of the special assessment too small, tends also to make the award of damages too large. The result is that the abutting owner seldom pays in full even the part of the benefit added to his property which the city intended to assess against him.

It is thus claimed that the system of special assessments as it works in most of our states frequently fails to secure to the city all or even a fair proportion of the increment of value to which the city might justly lay claim. When the city has finished making all the deductions from the full amount of the value which it has created by its improvement and actually collects its special assessments, it usually finds the amount of those assessments to be only a part of the cost of making the improvement and a still smaller proportion of the betterment which the neighboring property owners have received.

While it is an essential feature of the policy of laying special assessments on property benefited by an improvement that the total amount assessed shall never exceed the cost of making the improvement, it may be questioned whether cities have thus far secured by this system as large a portion of that cost as they might. They have usually shown more desire to avoid burdening the benefited property owners than to make their public improvements self-supporting. Most of the limitations on the amounts of special assessments levied are purely arbi-

trary, and cities which are still compelled to cling to them cannot be said really to have tested out the financial possibilities of the special assessment system.

There are two modifications of this policy of financing public improvements which are designed to allow the city to recover a much larger proportion of the benefits created by those improvements. Where these improved special assessment policies have been tried out they have, in many instances, returned to the city every dollar which the improvements cost.

The first of these modifications is the so-called plan of deferred assessments. It has been suggested that a city is usually required to estimate in advance the amount of benefits which it can assess to the property adjacent to an improvement, and that these estimated benefits are, for one reason or another, much smaller than the benefits which later accrue. Under a policy of deferred assessments the city waits until the expected increase in the value of the neighboring property actually takes place. It can assess, if necessary, the full amount of this increase; while at the same time it is not obliged to make a property owner pay for an accretion in value which has not yet occurred. The system of deferred assessments will, if effectively applied, net the city a substantial money gain without working any injustice to the owner of the assessed property.[9]

The second scheme for increasing the effectiveness of the system of special assessments consists in the extension of the district upon which assessments are laid until it equals in area the district in which property is

[9] The operation and advantages of this plan are described by Mr. Frederick Law Olmsted and Mr. Lawson Purdy in *Proceedings of the Fourth National Conference on City Planning*, 1912, pp. 75-77. Mr. Purdy states that deferred assessments, used frequently in Europe, have never been introduced in this country.

measurably increased in value by the improvement. In other words, assessments will not be confined merely to property immediately abutting on an improvement, but a charge will also be placed upon any and all property in the neighborhood which the improvement benefits. The increase in the value of neighboring property will be less, the greater its distance from the improvement; and for that reason it would not be fair to impose as heavy a charge upon property two blocks from a highway or park as upon property which abuts upon it. It is quite possible, however, to devise a sort of sliding scale by which the assessments levied are made to correspond in fair approximation to the amount of benefit received. The most striking example of the successful application of this plan is to be found in the development of the park and boulevard system of Kansas City, Missouri. Bound down by limitations upon its borrowing power, the city faced the dilemma of doing without parks and pleasure-drives commensurate with its size and prosperity, or of making those improvements pay their own way. The city worked out a plan, therefore, for laying special assessments upon all the property whose value was measurably increased by a public improvement. As far as ordinary streets were concerned the city continued to content itself with placing a charge upon the immediately abutting property. In the case of boulevards special assessments were levied also upon the property fronting on the next adjoining parallel streets. When parks were needed, a park district was created for purposes of assessment. The immediately abutting property was heavily assessed and the outlying parts of the district were divided by arbitrary lines into zones upon which charges were placed, proportioned roughly to the amount of benefit accruing to them by reason of the creation of the

park. Between the years 1896 and 1913, Kansas City expended upon its park and boulevard system the sum of $11,679,902. By the scheme of special assessments just described, it recovered 82.3 per cent of that amount.[10]

This has been accomplished, furthermore, without unduly burdening the property owners affected. Careful investigations indicated that parks and boulevards caused an increase in land values far greater than the cost of making those improvements; so much so, in fact, that there were numerous cases in which large property owners asked the park board to construct boulevards or parks through their lands and assess the costs upon their property. The experience of Kansas City would seem to indicate that American municipalities have not, as a rule, fully utilized the resources available to them in the system of special assessments.

This brief and general discussion of special assessments as they operate in American cities warrants, perhaps, the following conclusions as to the merits of that policy as a means of securing to the city the increment of value created by public improvements: In the first place, it is cautious to the point of sensitiveness about disturbing private property rights. Nothing is taken from a property owner usually but a portion of the value which the city's money and enterprise created, for no effort is made to assess the benefited property any more than just enough to meet the cost of the improvement. If the city actually makes a profit, it does not claim it; it attempts merely to make expenses. In the second place, in order to make expenses a city must be, in the operation of its

[10] See Mr. George E. Kessler's paper, "Actual Distribution of the Cost of Kansas City Parks and Boulevards." *Proceedings of the Fifth National Conference on City Planning*, 1913, pp. 140–147.

special assessment system, one hundred per cent efficient. It must definitely plan to recover the entire cost of an improvement and it must stop up all leaks. And since one hundred per cent efficiency does not often characterize the fiscal operations of even the most enlightened American city, it must follow, as a third and final conclusion, that the special assessment system as it is most generally practiced in this country is one under which, in nine cases out of ten, the funds of the city are paid out and not fully recovered, while an increment of value fairly belonging to the city is bestowed upon a limited group of property owners.

The second policy which might be proposed as a rival to excess condemnation as a means of securing the value which the city creates by making an improvement, is a system of taxes or charges which may be termed increment taxes. It has already been suggested that such a tax would differ from a special assessment in limiting the amount which the city could recover, not to the sum which an improvement cost, but to the whole amount of the increase in property values caused by the improvement. If the cost of the improvement is greater than the increment of value so created, the city sustains a loss. If that increment of value is greater than the cost of the improvement, the city, instead of allowing that profit to rest with the benefited property owners, takes that profit for itself.

No American state has yet authorized the levying of a charge of this nature and the few cases in which European countries have experimented with it are of relatively recent occurrence. That experience, moreover, has not in the main been along the line of definitely applying the increment tax to projects of public improvement.

The English increment tax was passed as a part of the famous Lloyd-George budget of 1909. It did not attempt to reach anything less than a ten per cent increase in the value of land. On all increments of value over ten per cent, however, a tax of twenty per cent was levied payable when the property was sold, passed by inheritance or leased for a period of more than fourteen years. A tax of somewhat similar character had been levied in the city of Frankfurt am Main in 1904. This was replaced, in 1911, by an imperial tax of a progressive type, ranging from a ten per cent charge on increments of value under ten per cent, to a charge of nineteen per cent on increments between one hundred and seventy and one hundred and ninety per cent.[11] The English Housing and Town Planning Act of 1909 permits the public authorities to intercept a part of the increment of value created by a public improvement but limits the portion of such increment which may thus be taken to one-half.[12] An almost identical clause is found in a town planning enactment passed in New Brunswick in 1912. Under these provisions it would be possible for the government to recover more than the actual cost of the improvement if the increase in the surrounding land values was sufficiently large. But ordinarily increment taxes have been levied with the idea of intercepting the general increments of value commonly called "unearned," rather than those caused by particular public improvements.

While there seems to be little available information as to how the increment tax works when used as a means of financing public improvements, it is possible to indicate one or two important ways in which it would differ from

[11] A brief discussion of these taxes is found in Seligman's *Essays in Taxation*, pp. 491, 508ff.

[12] 9 Edw. VII., Ch. 44, Sec. 58 (3).

a system of special assessments or excess condemnation. In the first place, if an increment tax of thirty per cent can be levied, there is no reason why the rate cannot be made much higher; and if the tax were designed to replace the special assessment charge this would probably be done. Instead of attempting merely to pay for an improvement, the city could take from the owners of benefited property all of the increment created by that improvement, or at least a liberal portion of any such increment. The tax could be made payable in annual instalments, in such a way as not to burden unduly the property owner at any one time. It would be practically a system of special assessments, minus the restriction of the amount which may be collected to the cost of the improvement; and there is no clear reason why it should not prove, when put into operation, quite as efficient as the latter policy, and more profitable.

Such a scheme is not, however, without difficulties and problems of its own. The first of these is the problem of determining how much of the increase in real estate values caused by public improvements the city can wisely take. From the standpoint of pure theory the city is entitled to the whole amount of such increase, and there would seem to be no hardship in compelling a man to give over to the city an increment of value definitely caused by the expenditure of public money. But suppose, to take an extreme case, that a piece of property worth $2000 before the opening of a boulevard becomes, after the completion of that improvement, worth $5000. It may be that the $3000 in a sense belongs to the city because it was created by the city, But as a practical matter, it would seem inexpedient to compel the owner of that property actually to pay $3000 into the city treasury. Clearly the city must content itself in such a case with a

portion only of the profit which it has earned. And if it takes a part only of that profit in this case why not in every case? And what percentage of that profit should it leave to the real estate owners who have done nothing to earn it? One does not imply that such a problem is incapable of wise solution by suggesting that it is a problem of no small delicacy.

There is, furthermore, the somewhat difficult task of determining to what extent the value of private property has been increased by the construction of a public improvement. In levying a special assessment, the city in most cases takes the cost of the improvement, or a definite percentage of it, and distributes it approximately according to the frontage held by the adjacent owners. In employing excess condemnation, the city has a very definite guide in determining to what extent the property adjoining an improvement has been benefited, and the question is answered for the city by the prices which the city can get when it sells the property which it condemned in excess of actual requirements. In levying an increment tax, however, neither of these convenient expedients is available. The city must place on the property involved a fair valuation before the improvement is made and another fair valuation afterwards; and the problem of determining quickly, peaceably and fairly what those valuations are, is not an easy problem to solve.

While it is impossible to draw final conclusions as to the practical working of a scheme which has never been put into operation, the foregoing discussion will probably sustain the tentative judgment that an increment tax applied to public improvements in cities would prove an effective financial policy. While the process of reaching a fair valuation of the property benefited by an improvement would afford generous opportunity for leakage and

even corruption, the city could, at least in most cases, recover with some margin the entire cost of making such an improvement. That much, at least, could be secured without hardship to any one, and that is a result of which the system of special assessments can boast in only a few extraordinary cases.

It is only within recent years that the possibility of employing excess condemnation as a means of financing public improvements has been regarded by any of our American states and cities as even an indifferent rival to the established policy of special assessments. No American city, as yet, has made any thoroughgoing trial of excess condemnation, and just how successful a means it will prove to be of intercepting the increment of value created by a public improvement, must still be a matter of speculation.

It has already been indicated that the American provisions authorizing the use of excess condemnation for financial purposes have fallen into two classes. In the first place, there have been those enactments by which a city was allowed to condemn land in excess of actual requirements and to resell that surplus land, with or without suitable restrictions in the deeds of resale as to its subsequent use. In other words, the city operating under such a provision had three courses open to it. It could employ excess condemnation for the sole purpose of making or saving money; it could use it solely for the purpose of protecting the beauty and usefulness of an improvement; or it could combine the two purposes, and utilize its power of condemning land in excess to recoup the cost of an improvement which at the same time it protected from injury or disfigurement. The second group of excess condemnation provisions referred to have been those which have conferred the power of reselling surplus land

without any reference to the placing of protective restrictions upon the future use of that land.[13]

It has already been stated that in no American city has there been any experience of any real importance with the policy of using excess condemnation as a means of financing public improvements. It will be worth while, however, to mention briefly some of the attempts made to take advantage of the powers conferred by the provisions just mentioned, even though they do not give a very definite indication of the results which might be expected from a more extended exercise of those powers. One or two projects of this kind, which have been definitely proposed but never undertaken, might also be mentioned in this connection.

One of the first American cities to receive this power of condemnation without being obliged to impose restrictions upon the surplus land resold was the city of Hartford, Connecticut.[14] It was permitted to dispose of the excess land "with or without reservations as to the future use and occupation of such real estate, etc. . . ." While on one or two occasions the city used this power for the purpose of dealing with small remnants of land, it has never

[13] Proposed amendment to New York Constitution, Art. I, Sec. 6. Defeated in 1911. Text is found in Laws of 1911, Appendix, p. 4.

Constitution of New York, Art. I, Sec. 7. Amendment adopted in 1913.

Laws of New York, 1914, Ch. 300. An amendment to the charter of the city of Syracuse.

Proposed amendment to Constitution of Wisconsin, Art. IX, Sec. 3b. Defeated 1914. Text in Laws of Wisconsin, 1913, Ch. 770.

Laws of Massachusetts, 1913, Ch. 778. Granting power of excess condemnation upon the State Highway Commission for a special purpose.

Laws of New Jersey, 1870, Ch. 117. Granting power of excess condemnation in the city of Newark.

[14] Laws of 1907, No. 61.

employed it as a means of financing a public improvement.

No attempt has been made by the city of New Haven to make use of a similar power granted to it in 1913.[15]

Of the five special acts granting the power of excess condemnation which have been passed by the legislature of Massachusetts,[16] three applied to special public improvements in the city of Worcester. The only one of these three grants of power of which the city has taken advantage is the act of 1912 relating to the widening of Belmont Street. But, in this case also, excess condemnation has been used only to acquire remnants of land. The city engineer describes the application of the statute as follows:

> We are now employing its power and taking all of the estate affected by the street layout where sufficient land does not remain for building purposes, the idea being to sell the excess area when opportunity offers. As yet we have had no return sales or disposal of this excess area, but we believe in time they will sell to advantage and greatly reduce the cost in land and other damages for the widening of the street.[17]

The same limited use seems to have been made of the power of excess condemnation conferred in 1913 upon the Massachusetts Highway Commission.[18] The commission was authorized to use this power in connection with the construction of a highway in the town of Swampscott. After making the plans for the improvement, the power to put them into execution and in so doing to secure any excess property which was deemed advisable was given to

[15] Laws of Connecticut, 1913, Special Act 243.
[16] *Infra*, p. 232ff.
[17] F. A. McClure, in a letter to the author, dated August 5, 1916.
[18] Laws of 1913, Ch. 778.

the county commissioners of Essex County. The chairman of the Massachusetts Highway Commission states, "My impression is that they, in some instances, did take more property than was necessary, and in at least one instance disposed of it. That was a little piece of property that was taken and I believe afterward conveyed to the Metropolitan Park Commission representing the commonwealth." [19]

In regard to the power to condemn land in excess which was given to the city of Salem, Massachusetts, in 1913, the city engineer of that municipality writes as follows: "The power of excess condemnation was granted us in the proposed widening of Bridge Street. This power has never been used. In the spring of 1914 we had planned to do this work and proceeded with it, but our disastrous fire occurred, wiping out one-third of the city, and the project was abandoned. At the present time we are proceeding to repave this street with permanent paving, but on account of financial conditions it was decided not to widen the street." [20]

In 1914 the power of excess condemnation was conferred upon the city of Syracuse, New York.[21] The city engineer states that there has been but one opportunity to make use of the power conferred, a case of a street opening or extension in which proceedings are now under way. He adds,

> There is no assurance, however, that the purpose will be accomplished, since the cost is deemed to be too great for the benefits conferred. The difficulty, however, is not in any way due to the application of the excess condemna-

[19] William D. Sohier, in a letter to the writer, dated August 5, 1916.

[20] George F. Ashton, City Engineer of Salem, Mass., in a letter to the author, dated August 7, 1916.

[21] Laws of 1914, Ch. 300.

tion principle, but rather because the cost will fall upon a few taxpayers, whose benefits are slight. As a matter of fact, there is a "kink" in our taxation scheme rather than in the excess condemnation idea. . . .

A proposed street extension forty feet wide passed through a lot sixty feet wide, leaving a narrow strip at each side. We proposed to take the whole lot, open the street and dispose of the excess in whatever way seemed to the city's best interests.

We have not reached the final stages, and therefore can offer you no experience of value in the matter of the final disposition of the excess land.[22]

Although the actual experience which American cities have had with excess condemnation as a financial measure seems to be limited to the meager instances just noted, a proposal was recently made to apply the policy in the city of Cleveland, Ohio. The provision of the Ohio constitution, by authority of which the city could exercise that power, was drafted with the idea of using excess condemnation in cases where there was need of protecting the beauty or usefulness of a public improvement, since it contained the clause that the surplus land should be sold, "with such restrictions as shall be appropriate to preserve the improvement made." While the proposal to use excess condemnation in the case in point was made for the subsidiary purpose of replotting numerous remnants of land and imposing protective restrictions upon the real estate abutting the improvement, the primary purpose for attempting to take land in excess was so undeniably a financial one as to justify including a discussion of the project in the present chapter. The proposal was made and discussed, furthermore, with a con-

[22] Mr. Henry C. Allen, in a letter to the author, dated August 3. 1916.

creteness and detail which cast a good deal of light upon the financial results which excess condemnation might be expected to produce.

The improvement proposed was to open or extend Carnegie Avenue at two separate points. The first of these extensions was in the business section of the city and would involve the opening of an eighty-foot thoroughfare between East Fourteenth Street and East Twenty-second Street. The second extension would create a street of the same width in the residential section of the city between East Eighty-ninth Street and East One Hundredth Street. With these sections opened up Carnegie Avenue would be a through thoroughfare from the center of the city well into its outlying districts, and would greatly relieve the traffic congestion on two parallel avenues on which trolley lines ran.

Careful thought was given to the problem of meeting the cost of these much needed improvements, and in the spring of 1914, the director of law of the city submitted to the mayor a rather elaborate report dealing with the question of ways and means. This report contained an analysis of three methods of paying for the projected street openings.[28]

Under the first method, the city would issue bonds to pay for the cost of purchasing the land required for the new street and the cost of making the streets. The abutting property owners would be assessed for the expense of building the street, but would not be asked to pay any part of the purchase price of the land. The total cost to the city under this method would be $563,525.

In employing the second method, the city would make

[28] *Proceedings of City Council of Cleveland,* May 11, 1914, p. 349; Letter of J. N. Stockwell, Director of Law, to Mayor Newton D. Baker.

use of a power conferred upon home-rule cities in Ohio by the constitutional revision of 1912. This was the power, when property is needed to be acquired for a public improvement, to assess not more than one-half the purchase price upon the property benefited and not in excess of actual benefits conferred. While under the most favorable conditions the city could by such an assessment recover one-half the cost of acquiring the land needed for the new streets, it seemed that those most favorable conditions did not and could not obtain. In the words of the director of law:

No such benefits as half the purchase price of the land could possibly accrue to the abutting and adjacent property, by reason of the fact that the street opening would leave the adjacent lands in odd parcels illy adapted to use. In many cases, narrow strips will abut lengthwise upon the proposed street, and any benefits which will accrue to these strips, or to the adjacent lots which now front upon the side streets, could be utilized only by the concentration of ownership of all the parcels in each square, so as to make possible their reallotment with frontage upon the proposed street. Any benefit, therefore, to these lands is contingent upon the ability of the owner of some one parcel to acquire other contiguous parcels; consequently assessments which the city might attempt to make upon this adjacent property, if of any considerable amount, I feel satisfied would be vigorously contested. I do not venture to say what part of the fifty per cent assessment upon this abutting and adjacent land could be enforced, but it seems to me safe to say that no more than twenty-five per cent of the total cost could be held valid.[24]

On the assumption that the city would recoup one-fourth the cost of the land to be acquired, this method would reduce the gross cost of the entire project to $425,406.

[24] *Ibid.*, p. 350.

The third possible method of financing these two extensions was by the use of excess condemnation. Under this plan, no special assessments would be levied for any purpose, and the city would face the problem of paying for land acquired and the cost of building the street, the sum of $662,975. In addition to the land needed for streets, the city would condemn abutting and adjacent property valued at $1,251,261. It was estimated that by the construction of the improvement the value of this excess land would be increased to $1,816,249. The city would apply to the cost of the undertaking the $564,988 thus made as a profit, thereby reducing that cost to $97,-987.[25]

This estimate of the financial results to be achieved by applying excess condemnation to these projects was based on a very elaborate report prepared at the request of the city by the Manufacturers' Appraisal Company.[26] In this report the value both before and after the opening of the street of all the parcels of property affected was carefully appraised. It is interesting to note that there was a marked difference in the way in which the use of excess condemnation would have worked out in the two separate extensions proposed. The opening of the street between East Eighty-ninth and East One Hundredth Streets promised practically no enhancement in the value of the adjacent property. This was due to the fact that this was already a very attractive residence district which would enjoy no particular benefit from the opening of a new thoroughfare. In this part of the improvement the increase in land values due to the extension of the street would be more than offset by the damage done to the

[25] The city has never proceeded with this improvement.

[26] *Report on Proposed Carnegie Avenue Extensions,* Cleveland, Ohio, published by Manufacturers' Appraisal Company, May, 1913.

property destroyed in connection with the taking. The city would, in fact, suffer a net loss of some $77,000, quite apart from the cost of building the new street and the administrative expenses of the undertaking. On the other hand, the opening of a street in the business district, between East Fourteenth and East Twenty-second Streets, would produce a very pronounced increase in the values of the neighboring property. New frontages and new corners would be made available in a part of the city where there is now a demand for business sites. This accretion in value would, in fact, be sufficient, when intercepted by excess condemnation, to net the city about $90,000 exclusive, once more, of the actual cost of street construction and administrative charges. These estimates are of considerable value as showing how excess condemnation might reasonably be expected to work when applied for purposes of recoupment to a concrete project.

In 1912, Mr. James A. Gallivan, Street Commissioner of Boston, discussed before the National Conference on City Planning a proposal to finance the construction of a business thoroughfare in Boston by means of excess condemnation. While it is impossible to study this project in the same detail as the proposed Cleveland improvements just mentioned, it nevertheless indicates how the financial outcome of such undertakings tends to vary under different circumstances.

The highway proposed in this case was to meet the need for additional traffic facilities. In order to construct it the city would need to take property valued at $8,118,811. The remnants which might be taken under the act of 1904 [27] would cost $3,804,899.

If the city undertook, however, to make a thorough application of the excess condemnation principle and take

[27] *Supra*, p. 62ff.

such land as might be markedly benefited by the improvement, it would need to condemn a strip on either side of the proposed highway one hundred and twenty-five feet in depth. This surplus land would have an assessed value of $7,875,700. If the city were fortunate enough to be able to acquire all of these three types of property at its actual assessed value, it would have to pay for it nearly $20,000,000. But there was little likelihood of securing the land at so low a figure. The high rental value of the property would in all probability add fifty per cent to the condemnation price, making the gross cost to the city close to $30,000,000.

In order to recoup this sum, the city would have to resell the surplus property at a price one hundred and fifty-three per cent over its assessed value. It was Mr. Gallivan's opinion that such an increase in the value of the neighboring land could not be expected for several years to come. In the meantime this surplus land would be left on the city's hands and unless it could be put to a financially profitable use the interest charges and the loss of taxes on the land would soon offset a very large proportion of the expected recoupment. The whole project seemed to be attended with rather serious financial risks.[28]

The cities of the United States which enjoy the power to use excess condemnation have proceeded very slowly, somewhat timorously, with their exercise of that authority. One or two of the cities of Canada, however, while they have had the right to employ this policy no longer than some of our own municipalities, have made much more extended and vigorous use of that power. It has already been noted that Halifax is employing rather con-

[28] *Proceedings of the Fourth National Conference on City Planning*, 1912, pp. 64–66.

sistently the power to condemn remnants of land.[29] The same is true of Toronto, although Toronto has not as yet made any use of its power of condemning excess land in two hundred foot zones on both sides of an improvement.[30] The city of Montreal, however, holds the very unique distinction of having carried out three projects of excess condemnation in which it disposed of all the surplus land taken and made a considerable profit. These undertakings merit rather close study inasmuch as they are among the most successful excess condemnation projects carried out by any city in the world.

The first improvement to which Montreal applied the principle of excess condemnation was the extension of St. Lawrence Boulevard from Notre Dame Street to the river front. The new highway was sixty-seven feet in width and about six hundred and fifty feet long. The charter of Montreal contains a clause providing that,

> the city is authorized to purchase by mutual agreement or to expropriate, more than the immovables or parts of immovables required for the object in view, in order to resell the same and apply the proceeds of such sale, wholly or partly, either to the payment of the purchase price of such immovables or parts of immovables, or to the payment of the cost of the works or improvements to be performed, provided always that the proprietors be not called upon to pay the purchase price of such immovables or parts of immovables.[31]

Acting under the authority of this clause, the city in 1912 condemned all the land lying between the north line of the new highway and the next street running parallel to it. This strip of land had an average depth of about seventy-five feet. On the south side of the new street a zone of

[29] *Supra*, p. 58ff.
[30] *Infra*, p. 236ff.
[31] Article 421 of the Charter of the City of Montreal.

land of about the same size was taken, although it did not extend through to the street line parallel to it.

The city paid for all the land which it condemned, 102,002 square feet, the sum of $690,850.00. It used 49,258 square feet of land for street purposes and sold the surplus at public auction for $722,194.00. The cost of advertising the sale and the fees charged by the auctioneers amounted to $6344.00. The city, therefore, made a profit of just $25,000.00 which could be applied to the cost of constructing the new highways.[32]

Two other projects of similar character have been carried out in Montreal. The area of land taken by the city in these cases was somewhat larger than in the St. Lawrence Boulevard opening but the profit accruing to the city was appreciably smaller, in one instance $12,817 and in the other $16,780.[33]

In 1913, Montreal entered upon another excess condemnation project which, due to unforeseen circumstances, bids fair to result far less fortunately for the city than those which have just been described. This is the St. Joseph Boulevard improvement. About 794,000 square feet of land were acquired by the city, at a cost of about $2,500,000 dollars. Some 556,100 square feet of this area was surplus land taken in excess of actual

[32] This information is made available through the courtesy of Mr. J. Hamilton Ferns, Chairman, Board of Assessors, Montreal, and is taken from the official records of the city.

[33] CARTIER STREET OPENING

Land acquired	130,817	square feet.
Land used for street	55,637	" "
Surplus land sold	75,180	" "

Gross cost of all the land	$ 99,626
Net proceeds from sale of surplus	112,443
Profit	$ 12,817

needs. Before the city had an opportunity to dispose of this land, the European war broke out and a very serious depression in the real estate market resulted. It was thought wise, therefore, for the city to continue to hold this property until such time as the market may assume a normal condition. Mr. Ferns, Chairman of the Board of Assessors, declares that while there will be considerable inroad into any prospective profit, by reason of the loss of interest charges and taxes on the land, this may be regarded as entirely accidental and due to highly abnormal conditions.[34]

On the whole the use of excess condemnation in Montreal has produced results which have been very satisfactory. The efficiency and dispatch with which the city has carried through its projects may well serve as a model for the cities of the United States which may undertake to use that policy.

While cities in both the United States and Canada may regard the use of excess condemnation for the purpose of making or saving money as a novel scheme to be used cautiously, the cities of many European countries are in a very different position. It is not new to them, for, while it cannot be said to have been anywhere utilized as a

George Etienne Cartier Square

Land acquired	164,504	square feet.
Land used for street and square	82,426	" "
Surplus land sold	82,078	" "
Gross cost of all the land	$ 82,252	
Net proceeds from sale of surplus	99,032	
Profit	$ 16,780	

Taken from the records of the office of the Board of Assessors, Montreal, courtesy of Mr. J. Hamilton Ferns.

[34] Letter to the author, under date of March 11, 1916.

settled and permanent policy of financing public improvements, there have been many European cities whose experience with it has been by no means slight. Excess condemnation, as a means of recoupment, has been employed in these cities in highly various forms and under many widely differing conditions. A brief summary of this foreign experience will throw a good deal of light upon the actual working of that policy.

The operation of excess condemnation as a means of financing public improvements in France will first be considered. No attempt will be made, however, to enter into a highly detailed discussion of the numerous projects in connection with which it has been used.

It has already been indicated [85] that by a decree issued in the year 1852 the city of Paris was given the power to use excess condemnation for the purpose of dealing with remnants of land. That decree provided, not only that such fragments of land as were incapable of suitable development were to be condemned, but that land outside the lines of a public improvement could also be taken when it was needed in order adequately to replot these remnants or land which was left on the city's hands by reason of the discontinuance of streets.

Under the provisions of this law the Government began to use excess condemnation for purposes which the law did not contemplate. It began to condemn land in excess of what it actually needed for a public improvement in order to intercept the increment of value which such an improvement was expected to create. The period between 1852 and 1869 was one in which marvelous things were done for the city of Paris. It was then that Baron Haussmann, as Prefect of the Seine, planned and executed the series of improvements which makes Paris

[85] *Supra*, p. 54.

to-day one of the most beautiful capital cities of the world, and which left the city with an indebtedness of some eight hundred million francs. During that period 56.25 miles of new streets were constructed, with an average width of about eighty feet. For the purpose of constructing these streets, replotting remnants and discontinued streets, and recouping the cost of the undertakings, the city condemned land at an outlay of $259,-400,000. In 1869, the city had sold part of the land which it did not need for $51,800,000, and still had on hand 728,000 square yards valued at only $14,400,000, though 390,000 square yards of surplus land had been acquired by the discontinuance of old streets and had cost the city nothing. The net result of the application of excess condemnation, in so far as it was used in connection with the building of these 56.25 miles of streets, was, therefore, to recover to the city about one-fourth of what the city had paid in the first place for the land.[36]

It is impossible to analyze the figures given above in greater detail, and certain data seems to be unavailable which would throw light upon these undertakings; but on the whole it is perhaps fair to say that, as a means of securing for the city any substantial portion of the increase in land values created by a public improvement, the policy of excess condemnation failed in Paris. This statement is further supported by the fact that these operations were carried on by the city under real estate market conditions which were most favorable. It was a

[36] Statement by H. R. Meyer, citing reports made by the Prefect of the Department of the Seine to the Emperor and to the Municipal Council of Paris. *Le Journal Officiel de l'Empire Français,* June 18, 1868; Jan. 13, and Nov. 28, 1869. *Municipal Real Estate Operations in Connection with Street Improvements in Paris, London, and the Provincial Towns of England,* Mass. House Doc. No. 288, 1904, pp. 57–60.

period of great prosperity and one in which land values everywhere rose and remained high.[37]

While the experience of Paris in using excess condemnation as a means of paying for public improvements seems to have been somewhat of a failure, it is possible to explain, at least in part, that failure. The unsuccessful working of the system seems to have been mainly due to administrative difficulties. The value of lands which the city found it expedient to condemn was appraised by juries, and the practice of these juries was to value the lands taken at a figure so notoriously beyond the real value as to upset completely the estimates of the authorities and eat up a large portion of the expected profits. These excessive awards, for instance, were almost entirely responsible for causing some important public works authorized in 1858, at an estimated outlay of $36,000,000, to cost $82,000,000.[38] In this connection, however, Mr. Meyer cites what he terms the proverbial exception which proves the rule. The completion of the Avenue de l'Opéra was authorized in 1876. Judging from its previous experience the city expected to pay $13,200,000 to the owners of expropriated property and to recover, through the sale of surplus lands, $4,200,000. Contrary to expectations, however, the city was obliged to pay but $10,800,000 for the land taken and the cost of the undertaking was reduced to $6,600,000.[39] As a rule, however, the city was obliged to see its expected recoupment swallowed up by the ridiculously high awards of condemnation juries.

Continued experience convinced the governmental

[37] Meyer, *op. cit.*, p. 58.

[38] *Idem.*

[39] Meyer *op. cit.*, p. 61; citing *L'Economiste Français*, April 29, 1876.

authorities that the city could not make a profitable use of excess condemnation as a means of financing public improvements, because the city, by reason of the fact that it was a public corporation, found itself unable to secure certain financial advantages which a private corporation could and would enjoy. The city entered, therefore, upon the interesting policy of farming out its various public improvement projects to private contractors. The contractor, in such a case, constructed the improvement without cost to the city, or at most received a slight subsidy. He bought up land adjoining the improvement by private sale or, if this was not possible, the city condemned the land for him. Whatever profit he made from the resale of the surplus land went to him as compensation, and he likewise sustained any loss which might occur. In several instances, streets were opened or insanitary areas were cleared by such an arrangement, at little or no cost to the city and at considerable profit to the contractor. Private capital seemed willing enough to assume the financial risks involved for the chance of securing the increment of value accruing to the surplus land. Mr. Meyer describes a proposal of this kind made in 1897 by a private corporation to the city of Paris. "M. Gérard, acting with the *Crédit Foncier*, offered to continue the Boulevard Haussmann by cutting through from la rue Drouot to la rue Tailbout. M. Gérard offered to turn the new street over to the city free of cost, expecting to recover more than the cost of the street from the resulting increase to the value of the property of which he and his associates had acquired the title or the control. The operation would have involved the acquisition by agreement, or by compulsion (exercised by the city), of 21,560 square yards, at an estimated cost of $13,000,000. It would have yielded 10,800 square yards

of surplus land, estimated to be worth $3,000,000. The remaining $10,000,000, M. Gérard and his associates expected to recover from the sale of property in the vicinity of the new street."[40] Apparently this proposal was not acted upon, for in 1912 the extension of the Boulevard Haussmann remained unbuilt. In that year the city itself proposed to let the project out to some contractor, and on more liberal terms than those stipulated by M. Gérard. Mr. Robinson, in his recent volume on city planning, explains in some detail the proposition which the city made.

The suggestion was then made, and approved by the Prefect of the Seine, that the work of extending the Boulevard Haussmann be given to a contractor upon the regular "sale by tender" basis. That is to say, the city would advertise that it desired to have the boulevard extended to the Grande Boulevard; and that it would use its powers of expropriation in behalf of any *concessionaire* who would undertake to pay the city the arbitrated value of the land, tear down the buildings and provide a thoroughfare; the contractor being allowed then to resell the lands not required for the thoroughfare, and make such profit as he could. "The contractor," said the Prefect of the Seine, "would very likely construct new buildings, and discount a profit which the city, acting for itsellf, could not consider. He could probably obtain better terms in the eviction of tenants; for he could make a formal promise to reinstate tenants after a short time, reasonably close to their former location. . . ." The specifications for the work stipulated, that should its cost exceed the estimated 50,000,000 francs, the city and the contractor should share the extra expense in the proportion of forty per cent. by the city and sixty per cent by the contractor. It seemed necessary to make this stipulation as a partial protection for the contractor, and

[40] Meyer, *op. cit.*, p. 63; citing *L'Economiste Français*, Sept. 9, 1893; July 11, 1891.

as an inducement to entertain the undertaking, for in a project carried out upon this basis in the Marbœuf quarter, the contractor had found the cost of the work onerous on account of the tendency of the arbitration board to be generous with property owners and evicted tenants, the arbitrators having realized that the city treasury could not suffer, the expense falling upon the contractor. Further specifications protected the city against nonfulfillment of the contract and against delays. . . . On the other hand, the city agreed to use its power of excess condemnation on behalf of the *concessionaire,* at his expense, and to evict tenants and to maintain order.

It seems not improbable that on some such agreement as this a contractor, or a group of capitalists, might often be willing to undertake a considerable municipal improvement without cost to the city — a result which, in the end, would be the same as if, by the exercise of its right of excess condemnation, the city had been able to recoup expenses through the sale of the excess lands at enhanced values.[41]

This willingness on the part of the French Government to hand over to private interests the profits accruing from the use of excess condemnation in financing municipal improvements, if those private interests will, in turn, assume the financial risks incident to the use of that policy, is a striking confession of lost confidence in that plan. The failure of excess condemnation as a method of municipal finance may have been merely an administrative failure. It was nevertheless a failure. To a large extent it was replaced by the plan just discussed, of farming out the construction of public improvements to private contractors. The Council of State, furthermore, which was originally inclined to permit the use of excess condemnation for purposes of recoupment, although its use for such a purpose was clearly beyond the contempla-

[41] Robinson, Charles Mulford, *City Planning,* p. 262.

tion of the statutes, came ultimately, as has been suggested, to assume a much stricter attitude, and began to limit with considerable rigidity the amount of land which a city might condemn in excess of its real requirements. Recently, therefore, there has been little or no effort in France to use excess condemnation as a money-making policy.[42]

The strict construction placed by the Council of State upon the power of excess condemnation formerly used so freely will make necessary a change in the French statutes before any return is possible to the old practice of using that policy as a means of municipal finance. Yet there seems to be a growing conviction in Paris that excess condemnation can be successfully employed as a means of recoupment, and the past few years have witnessed several attempts to revise the laws relating to the condemnation of land so as to make such a policy possible. A proposal to that end was made in the Chamber of Deputies in the spring of 1914, but the provision finally enacted into law was modified so as to eliminate the clauses actually broadening the existing power of excess condemnation. It is alleged that the emasculation of this bill was not due to any hostility of the French Parliament to the principle of excess condemnation for recoupment, but rather to a feeling that the proposal was not well timed.[43]

The experience of Belgium with the use of excess condemnation as a means of serving the double purpose of paying for public improvements and protecting them, has been of a distinctly different character from that of

[42] *Supra*, p. 55ff. The decree of 1852 had been extended to apply to all French cities.

[43] Rolland, Louis, *New Tendencies in the Matter of Expropriation for Public Purpose. Revue du Droit Public et de la Science Politique en France et à l'Etranger,* Vol. 31, 1914, p. 659.

France. It is an experience in which serious blunders have been made and heavy losses have been sustained, but it has been an experience from which Belgian cities have profited; so much so that excess condemnation is part of the permanent and settled program for the carrying out of public improvements. In 1904, Mr. Edmund M. Parker prepared for a committee of the Massachusetts legislature a very careful summary of the operation of this system in Belgium.[44] He traces the essential steps in the history of excess condemnation in Belgian cities, prior to the last few years.

In 1867 a law was passed in Belgium which gave to cities the right to condemn not merely the land needed for a public improvement but a zone of surrounding territory. This land could be taken either for the purpose of improving sanitary conditions or for the purpose of protecting public improvements or for both. In the city of Brussels, for whose benefit the law was passed and by which the powers it granted were first used, these two purposes were very frequently combined.

The center of Brussels was exceedingly congested. Its streets were narrow and crooked, individual lots were extremely small, sanitary conditions were most unwholesome, and matters were made much worse by the fact that the river Senne and its several branches, which flowed through the heart of the city, formed the readiest means of sewage disposal.

A plan was finally evolved by which the river was to run in a series of conduits, directly over which was to be constructed a splendid highway which would serve as a fitting center to the business district of the city. Obviously, it would be necessary to find some way of con-

[44] Mass. House Doc. 1096 (1904), Edmund M. Parker, Chairman of Legislative Committee on Eminent Domain.

trolling the property abutting on such a thoroughfare, as well as some way of lightening the expense of the undertaking. It was for the purpose of meeting these two needs that the law of 1867 was passed.

Work was begun in the year 1868, and the improvement itself was brought to completion in the late seventies and forms the present New or Inner Boulevards.

The city made liberal use of its new power of excess condemnation. Part of the land fronting on the boulevard was used for public buildings, but most of it was offered for sale to those who would undertake to construct suitable buildings. Fearful lest the boulevard and its surroundings should not be adequately and quickly developed, the city sought to stimulate that development by offering for sale on ridiculously easy terms the abutting land which it had taken. The purchaser of such land was required to make an annual payment of four and one-half per cent. on the purchase price for sixty-six years. In addition the city offered to loan on easy terms to such contractors as would put up suitable buildings on the land they purchased, one-half of the estimated cost of those buildings.

The result of the making of such easy terms was exceedingly disastrous to the city. In practice, the loans which the city advanced proved to be more than half of the cost of the buildings actually erected. In many cases these loans were never paid and the city was forced to take the half-finished buildings and complete them. It was obliged, in other instances, to take back land which it had sold because the purchaser failed in his payments. In addition to these losses, the company which had been awarded the contract for the construction of the conduits and boulevards failed, and the city was obliged to complete the work at a cost larger than the original esti-

mate. The outcome of it all was that the city went to the verge of bankruptcy with a debt of some $50,000,000. It still held title in 1904 to some four hundred buildings which it rented, and for which it had paid about $6,400,000, perhaps a million dollars more than it could get from the sale of them.

Several undertakings of a similar character were entered into by the city of Brussels in the early eighties, and the financial results were about equally disastrous. As soon as these results, however, began to be apparent, the city abandoned its foolhardy policy and put the reselling of the excess land it condemned upon a sounder financial footing. Instead of the easy terms originally offered, at least twenty-five per cent. of the purchase price of such land had to be paid in cash. The remainder was to be paid in fifteen equal annual instalments with interest at four per cent. The policy of making loans to prospective builders was completely abandoned. The opinion of the officials of Brussels is, that had this more reasonable policy of disposing of the surplus land been adopted in the beginning, the city would have avoided most of the financial disasters which have been described. Mr. Parker declares: "So far from Brussels having concluded by reason of her trying experience that the taking of land by zones was an error, it is stated by those in authority that since she has had authority to take land in this way she has employed no other method; but, as has already been stated, it would appear that the objects she has in view in her takings, viz.: the improvement not only of her highways but of the appearance and sanitary conditions of the city, can be attained in no other way." [45]

Other Belgian municipalities have used excess con-

[45] *Idem*, p. 15.

demnation for the same purposes as has Brussels, and by reason of better business methods and more favorable conditions have been able to avoid the difficulties in which Brussels became involved. In Liege, for example, several improvements in connection with which excess condemnation was used netted the city an actual profit.

The state itself in Belgium does not have the power to condemn land in excess, that authority being given only to cities to be exercised under state supervision. Accordingly, there has arisen the interesting situation of the Central Government entering into a contract with the city of Brussels, by which the city agrees to use its power of excess condemnation on behalf of the state in connection with the construction of a railroad terminal. The state agrees to advance whatever funds may be necessary for the project, and also assumes full responsibility for any risk which is involved in the undertaking.

The cities of Belgium have, as Mr. Parker points out, applied excess condemnation to a type of project to which it is peculiarly adapted, namely, projects in which the area condemned in excess stands in great and immediate need of rehabilitation. Even at a money loss such improvements are worth making. The experience of Brussels and Liege would seem to indicate, however, that if wisely administered a money loss is by no means a necessary result in such an undertaking.

There is probably no country in which excess condemnation has been used as a method of municipal finance for so long a period and with such interesting results as in England. In American cities excess condemnation shows no immediate signs of becoming a genuine rival of the policy of special assessments as a means of paying for public improvements. In the English cities, however, it

is only within the last few years that special assessments have begun to compete with the scheme of excess condemnation. What we, in America, term "excess condemnation for the purpose of making money," the Englishman describes by the one word "recoupment." A brief history of the way the policy of recoupment has worked in England will cast considerable light upon the value of that scheme as a financial expedient.

The legislative history of excess condemnation in England is, in one respect, similar to that of France. In neither case did the statute under which that power was exercised for many years confer any authority to condemn land in excess except in cases of land remnants. In both countries the use of this policy as a measure of municipal finance was clearly beyond the original contemplation of the law, and grew up largely as a matter of usage. In England, however, as contrasted with France, the authorities acquiesced in this expansion of the law until it became to all intents and purposes a part of the law itself.

Excess condemnation in England dates back to the Land Clauses Consolidation Act of 1845, which was a sort of codification of all of the previous enactments relating to the taking of private property for public use.[46] Only a few of the provisions of this statute are of any interest in the present discussion. There was a clause declaring that no one could be compelled to sell to the authorities constructing a public improvement, a part of a house, building or manufactory if he was willing and able to sell it all.[47] Another provision stipulated that if the construction of a public work left a remnant of vacant land less than half an acre in size, the owner of such a fragment could compel the authorities

[46] 8 and 9 Vict., Ch. 18.

[47] Section 92.

to buy it unless he owned land adjoining with which it could be merged. Any work necessary to accomplish the joining of the remnant to the neighboring land must be done and paid for by the public authorities.[48] If, however, the cost of making suitable connections between remnants of land divided by an improvement was greater than the value of the remnants, the authorities could condemn them.[49] The act stipulated that the official body promoting a public improvement should sell all surplus lands which it may have acquired within ten years after the completion of the work. Any such land remaining unsold at that time should thereupon become the property "of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."[50] And finally, when the authorities were ready to sell these surplus lands they were required to offer them first to the person who originally owned them; if he could not be found or refused to buy them they must next offer them to the owners of the adjoining property.[51]

It is apparent that the Land Clauses Consolidation Act did not purport to confer upon any public authority the power to condemn lands in excess of actual requirements for the purpose of reselling them at a profit. The first attempt to enter upon a policy of condemning land for recoupment was made by the Metropolitan Board of Works, which from 1857 to 1889 had control of the public improvements constructed in the city of London.

It was the policy of the Metropolitan Board of Works to apply to Parliament in the case of each projected improvement for authority to condemn land, and while the

[48] Section 93.
[49] Section 94.
[50] Section 127.
[51] Section 128.

general provisions of the Land Clauses Consolidation Act governed these takings, the actual amount of land condemned was decided upon by the Metropolitan Board and the Lord Chairman of Committees of the House.[52] In this way the practice gradually grew up of taking, in connection with the construction of a public work, a good deal more land than was necessary in the hope of reducing the cost of the improvement by its subsequent resale or lease.

The plan of recoupment does not seem, however, to have worked with much success during the régime of the Metropolitan Board of Works. Between 1857 and 1889 the board widened 14.13 miles of streets in the city of London. In order to accomplish this, the board condemned land worth $58,859,000 and recovered from the sale of surplus land $26,608,000 or 43.5 per cent. of the cost.[53] Experience seemed to indicate that the resale of surplus lands did not, in most cases, cover the cost, and the board began, therefore, to adopt a more conservative policy in its condemnation. It confined itself, in the main, to the taking of smaller estates immediately abutting on an improvement when they could be secured at small cost.[54] They also

[52] Report of Select Committee of House of Lords on Town Improvements (Betterment), *Parliamentary Papers,* 1894, Vol. xv, Questions 3652–3654; also Edwards, *History of London Street Improvements,* p. 11.

[53] Edwards, *op. cit.,* p. 139. In the Report of the Royal Commission on London Traffic, 1906, (*Parliamentary Papers,* 1906, Vol. xliii) there appear tables showing the gross cost of each improvement constructed and the amount of recoupment. While an interesting fluctuation appears in the percentage of the recoupment to the gross cost, it is impossible, from the limited data presented, to explain that fluctuation. It did not seem worth while, therefore, to reproduce those tables as they do not lend themselves to further analysis.

[54] Edwards, *op. cit.,* p. 17.

did not take costly buildings cutting through new streets, at the cost of selecting an irregular line with awkward and unsightly ends thrust into the frontage of the new avenue. It it said that this policy at times impaired the dignity and convenience of the new street to such an extent as to give the street a bad name, and to prevent the small bits of surplus land from bringing such sums as would materially reduce the cost of the street.[55]

There is ample evidence to show that the results of excess condemnation for recoupment, as practiced by the Metropolitan Board, not only were in general unsatisfactory, but were also recognized to be unsatisfactory by those intimately acquainted with those operations. When, in 1877, a fresh grist of public improvement bills providing for some application of the recoupment principle was presented for approval to Parliament, the Marquis of Salisbury voiced his objections to the policy in no uncertain terms.

> No doubt it is right that the board should repay itself for street improvements by deriving a profit from the frontages created by a new street; but it by no means follows . . . that whenever the board makes a street it has a right to speculate in frontages. At best, it is an exceptionally dangerous power to give the Board of Works. It by no means follows that the taking of the frontages will in all cases be a repayment to the ratepayers, though it is certain that in all cases it will be a serious disturbance to the freeholder . . . at one time it was thought that every railway would pay; now it is thought that every new street will enormously raise the value of the frontages. I believe the ratepayers will some day find, to their cost, that this idea is a delusion. Those purchases and resales of land, which the Metropolitan Board is so fond of, involve great expense in fees to lawyers, archi-

[55] *Report of Legislative Commission on Eminent Domain*, Mass. House Doc. 288, 1904, pp. 64-65.

tects, surveyors and valuers whose time is valuable and whose charges are proportionately high. I have had an opportunity of knowing something about it in connection with two or three railway companies, whose difficulties were very seriously aggravated, if they were not entirely caused, by surplus land which they had acquired and which they had disposed of, and by the enormous charges which followed on that operation. It is very much to be feared that the Metropolitan Board, unless it sells those frontages with great discretion, will find the costs of the machinery employed in disposing of them such as entirely to destroy the profitable nature of the operation; and that it will discover that, while it has in its power to do great damage and to inflict great loss on the freeholders, it has also in its power to squander the money of the ratepayers.[56]

In 1894, Mr. Charles Harrison, Vice Chairman of the London County Council, testified before a committee of the House of Lords that recoupment, as it had been carried out in London by the Metropolitan Board, had been unsatisfactory and had, as a general rule, resulted in loss. In support of this statement he cited the case of Gray's Inn Road, an improvement in which a street had been widened.

Gray's Inn Road, which was required to be carried out on the recoupment basis, after giving credit for actual receipts, cost £338,992. Now, we have had taken out the value and prices paid and everything only for those properties which would have had to be acquired if the land required for the street alone had been taken, and the cost of the property actually required for the street would have been £252,700. So that on that occasion the public authority lost £86,292 by taking in that band of land for recoupment.[57]

[56] *Hansard's Parliamentary Debates,* August 10, 1877, p. 743.
[57] *Report of Select Committee, op. cit.,* Question 1390.

Mr. H. L. Cripps, the parliamentary agent of the London County Council, who had been for twenty-five years a member of the Metropolitan Board of Works, testified before the same committee that "it may be taken generally that in no single case, according to the opinion of competent valuers, has recoupment turned out other than an extravagant operation." [58]

There was one improvement made by the Metropolitan Board, however, in which the policy of recoupment appears to have resulted in a financial success, in striking contrast to the gloomy results usually achieved in such projects. This was the case of the opening of Northumberland Avenue, completed in the year 1875. The board purchased land in this instance for $3,293,000. After the street was opened it sold the land it did not need for $4,157,000, thus making a profit of about $860,000. Some $600,000 of this profit remained after the cost of constructing the street had been deducted. The project appears to have been phenomenally successful, and is very frequently cited to show the profits which will accrue to a city through a wise use of excess condemnation.[59]

A closer examination of what actually took place in the Northumberland Avenue improvement seems to indicate that that case was quite exceptional and that even the large profit which the Metropolitan Board derived from the undertaking was, by reason of mismanagement, very much smaller than it should have been.

In the first place the board was able to purchase the

[58] *Idem, op. cit.,* Question 343.

[59] *Idem, op. cit.,* Questions 345, 2087. Edwards, *op. cit.,* p. 17.

land needed for the new street at an exceedingly low figure. It was unnecessary, for instance, to acquire any trade interests, or, in other words, to pay damages to cover the loss suffered by business men who were obliged to give up their locations. These damages in other cases had frequently been almost as large as the purchase price of the land condemned. Furthermore, the land taken for the new street was practically all owned by one man who, for special reasons, sold it to the city at a bargain price. The property consisted of Northumberland House and four or five acres of land. The Duke of Northumberland was willing to sell at a figure which guaranteed a liberal profit to the city, in order to induce the city to open up the land and take it off his hands. He did not care to undertake the task of laying out the land for building purposes and run the risk of long delay and loss.[60]

The Northumberland Avenue project turned out profitably, in the second place, because, when the Metropolitan Board got ready to sell the surplus land, it found itself besieged by persons who wished to buy. The sites offered for sale were speedily purchased by a number of large hotel interests which had been waiting for an opportunity to find suitable locations in that part of the city. The board was able to sell its surplus land both quickly and profitably.[61]

It would seem, however, that the conditions surrounding the acquisition and disposal of the land were not more favorable in this case than was necessary, for the Metropolitan Board proceeded to allow a large proportion of

[60] *Idem, op cit.,* Questions 344–348 inc.
[61] Edwards, *op. cit.,* p. 11.

the profit which should have accrued to the city to slip through its fingers. The consensus of opinion is, in short, that a considerable portion of the profit slipped directly into the pockets of some of the members of the Metropolitan Board. In return for bribes, the board disposed of valuable properties at prices far below their actual value. There is some uncertainty as to how much money the city actually lost through these dishonest methods, but Mr. W. Emden, a member of the London County Council and of the Parliamentary Committee of that body dealing with street improvements, testified in 1894, before the committee of the House of Lords already referred to, that, "if the Northumberland Avenue project had been well and properly managed and honestly dealt with, undoubtedly a very vast amount more would have been made out of it; not £170,000, but I should have put it £500,000 or £600,000 or £700,000 more." [62] On the whole, the Northumberland Avenue improvement, as it was actually carried out, cannot be said to afford a particularly valuable argument for those who advocate the use of excess condemnation for purposes of recoupment.

But while most of those who were qualified to have an opinion believed, in spite of the apparent success achieved in the Northumberland Avenue project, that the experience of the Metropolitan Board of Works with the policy of recoupment had been consistently unsuccessful and disappointing, there was also a feeling

[62] Testimony of Mr. Walter Emden, *Report of Select Committee, op. cit.*, Question 2788; statements indicating the existence of corruption in this case appear in Arthur A. Baumann's *Betterment, Worsement and Recoupment*," pp. 92–100, also in his testimony and that of others before the Select Committee, *op. cit.*, Questions 2660–2704, etc.; and in the Interim Report referred to *infra* p, 166, footnote 68.

that the scheme was not inherently unworkable. If the reasons why recoupment had failed could be discovered and the difficulties overcome, then recoupment itself might, after all, prove successful. Three causes were found which had contributed to that failure.

The first reason for the failure of the policy of recoupment was the fact that the Metropolitan Board consistently, as a matter of policy, paid more for land which it condemned than the land was worth. In each case of condemnation the fair market price of the land was discovered by appraisal or by arbitration, and the board then added ten per cent of that amount as compensation for the compulsory taking. This ten per cent was a sort of bonus paid to the man whose property was taken from him. Public sentiment and long established precedent sanctioned the payment of this bonus, but in each case it increased, by just that amount, the financial risk which the board was obliged to assume in its attempt to recover the purchase price of the land by the sale of the surplus.[63]

A second factor which made the profitable use of recoupment almost impossible has already been mentioned.[64] This was the exceedingly high prices which had to be paid to buy out trade interests which had to be disturbed. The report of the Massachusetts commission already cited describes this situation with great clearness.

Whenever a public authority takes land by compulsory powers under the Land Clauses Consolidation Act of 1845, every occupant of that property, whether freeholder or leaseholder, who has been carrying on a business on that property,

[63] *Report of Legislative Commission on Eminent Domain,* Mass. House Doc. No. 288, 1904, p. 69.

[64] *Supra* p. 163.

is entitled to compensation, if he can show that dispossession will impair the goodwill of his business. Frequently there is very little injury to that goodwill and yet in practice, the juries' awards for compensation practically always are based on the supposition of complete, or all but complete, destruction of the goodwill.[65]

Mr. Charles Harrison, quoted above,[66] declared, "The figures which I have taken out of all these recoupment cases (the figures were not put in evidence) show, not that there is a loss on the land which you acquire, but the loss or recoupment arises exclusively from your buying that which you cannot resell (trade interests), and represents so much waste, costs and other items of expenditure attached to each particular interest." [67]

A third source of loss to the public in connection with the improvements to which the Metropolitan Board applied the policy of recoupment was the corruption of the board itself. It is unnecessary to go into details. It is sufficient to state that conditions grew so notoriously bad as to cause the appointment, in 1888, of a "Royal Commission to Inquire into Certain Matters Connected with the Working of the Metropolitan Board of Works." In its report this commission uncovered an organized system of jobbery and corruption in connection with the purchase by the board of trade interests as well as in connection with the resale of surplus lands.[68] There is no question whatever that the Government lost very large sums of money through the systematic dishonesty

[65] *Report of Legislative Commission on Eminent Domain, op. cit.*, p. 72.

[66] *Supra*, p. 161.

[67] *Report of Select Committee, op. cit.*, Question 1383.

[68] Interim Report made in 1888, *Parliamentary Papers*, 1888, Vol. 56.

of its officers, although there is no way of estimating even approximately how large those sums were.

There is no way of determining how important these three factors were in preventing the system of recoupment from proving financially successful. English authorities seem to feel, however, that the exorbitant sums paid by the Metropolitan Board for the trade interests it was obliged to acquire had a more serious effect than any other one cause upon the profits which should or might have accrued to the city from these various recoupment projects. In 1894, a select committee of the House of Lords was appointed to consider the advisability of combining a scheme of special assessments with the system of recoupment. In their voluminous report, already cited,[69] there is much discussion of the relative merits of the two plans, and many distinguished students of municipal finance gave the committee the benefit of their views. The conclusion of this committee regarding the system of recoupment was as follows: "Some evidence was given by persons who had actual experience of the operation of such a system, the general effect of which was, that it had not proved successful; but the committee are not satisfied that it has ever been tried under circumstances calculated to make it successful, inasmuch as no sufficient power has ever yet been given to local authorities to become possessed of the improved properties without buying out all the trade interests, a course which is inevitably attended with wasteful and extravagant expenditure." [70]

By the Local Government Act of 1888 the Metro-

[69] Report of Select Committee of House of Lords on Town Improvements (Betterment) 1894. *Parliamentary Papers*, 1894, Vol. XV.

[70] *Report of Select Committee, op. cit.*, iii–iv.

politan Board of Works passed out of existence and the London County Council became and still remains its successor. The powers of the council in respect to public improvements did not differ materially from those of its predecessor. It was obliged to secure authority to expropriate private property whenever it entered upon the construction of a new public work, and its general policy of condemning land for public improvements was nominally still guided in the main by the Land Clauses Consolidation Act of 1845. But the kind of enabling act which it had become the settled policy of Parliament to pass allowed the council to put through street improvements with a freedom which would have been impossible if the Land Clauses Act had been strictly adhered to. These changes in policy all worked in the direction of making it easier to apply successfully the principle of recoupment. Permission could be readily obtained to acquire large areas of surplus land, either for profitable resale or for the purpose of rehousing those who had been dishoused in connection with an improvement. Greater freedom was allowed in reselling surplus land than under the act of 1845 and public authorities were frequently allowed to condemn part of a man's property without being obliged to take it all, a requirement which had earlier proved itself to be a serious hardship to the local government.[71]

Although these changes in the policy of condemning and disposing of land in connection with public improvements had come gradually to widen the county council's power to utilize the recoupment principle, the council did not seem satisfied that those powers were sufficient to

[71] Hunt, Frank W., "The Tendency of Recent Modifications of the Lands Clauses Act" in *Transactions of the Surveyors' Institution*, 1912, Vol. xliv, p. 117ff.

enable it to avoid some of the more serious difficulties which had confronted the Metropolitan Board of Works. Almost as soon as it assumed its new duties it began to study and discuss the relative merits of various methods of paying for public improvements.

It was suggested, for instance, that the burdensome necessity of buying out expensive trade interests which would be disturbed by an improvement would be avoided if the council were to acquire merely the freehold and long-leasehold interests. This would allow the tenant in immediate possession to stay until the expiration of his lease, and would free the council from any obligation to pay him damages. By far the liveliest discussion arose, however, over the question whether it would be wise to borrow the American system of special assessments, to be used either independently in paying for improvements or as an adjunct to the excess condemnation policy. Allusion has already been made to the select committee of the House of Lords which studied this problem and reported in 1894. The finding of the committee was in substance that the system of special assessments or "betterment charges" as they are called in England, was based on an equitable principle. There was room for such serious abuse in the operation of such a scheme, however, that the committee was of the opinion that it ought to be surrounded by certain safeguards to private rights not usually found in the American statutes on the subject.[72]

The result of the investigation and agitation promoted by the London County Council finally won Parliament over to a qualified approval of the system of special assessments. At the present time it is used in addition to recoupment in financing public improvement projects,

[72] *Report of Select Committee, op. cit.*, pp. iii–iv.

and by means of it the county council expects to recover a portion of the increment of value created by a public work which would be lost to the city under excess condemnation.[73]

The projects in connection with which the London County Council used the principle of recoupment alone show, in the main, very little better financial results than those carried through by the Metropolitan Board of Works. The council seems to have recouped a little over half of the gross cost of the undertakings, but as in the case of the Metropolitan Board's improvements, the data available regarding these projects is so meager as to make any illuminating analysis of it impossible.[74]

One improvement has been carried through in London

[73] The reason why special assessments have been viewed so differently in England from what they are in the United States is explained by Professor Seligman. "What appears almost self-evident to Americans is hotly disputed in England. In the United States the local taxes, so far as real estate is concerned, are imposed on the owner of the land; in England the local rates, as they are called, are levied on the occupier. In the United States the tax is assessed on all lands; in England it is assessed only on productive or rent-yielding land. In the United States, therefore, it was comparatively easy to add to the existing tax on the proprietor this newer system of charges; in England the process is more difficult, because it implies not only a change in the principle of charge, but also a change in the method of assessment. Not the occupier but the owner of the land, is to be directly reached. Thus the proposal, which in America is regarded as in harmony with vested interests, is viewed by its opponents in England as an attack on the rights of private property." *Essays in Taxation*, p. 434.

[74] Tables of figures showing the gross cost of each improvement and the estimated or actual recoupment were published by the Royal Commission on London Traffic in 1906, *Parliamentary Papers*, 1906, Vol. xliii pp. 110–113. These compilations have been kept up to date by the London Traffic Branch of the Board of Trade. *Parliamentary Papers*, 1908, Vol. xciii; *idem*, 1912–13, Vol. xxxix, Appendix F–I; *idem*, 1914, Vol. xli, Appendix F–G.

by the county council which has attracted very wide attention and which it is possible to study in some detail. Like the Northumberland Avenue project it is used by the advocates of excess condemnation as a striking example of the successful working of that scheme, and unlike the Northumberland Avenue project it seems to have been carried through with a high degree of efficiency and with very favorable results. The improvement referred to is the construction of the Kingsway, a wide thoroughfare connecting Holborn and the Strand. It is commonly referred to as the Holborn-to-the-Strand improvement. A description of this undertaking will cast considerable light upon how the system of excess condemnation for recoupment has worked on a large scale and under modern conditions.

There had long been a demand for the construction of this improvement. Proposals for it had been made as far back as 1836 and were repeated at more or less frequent intervals especially during the eighties and nineties.[75] The bill which finally provided for the improvement was passed only after considerable struggle. It involved the largest scheme of town improvement which had ever been placed before Parliament and called for a most extensive use of the principle of recoupment. Nearly forty powerful and influential companies and persons appeared as petitioners against the bill which was promoted before Parliament by the parliamentary committee of the London County Council. All serious opposition was finally quelled and the bill became law in 1899.[76]

One or two of the provisions of this act are worthy of mention. The county council was given liberal power

[75] Edwards, *History of London Street Improvements*, p. 252.

[76] London County Council (Improvements) Act 1899, 62 and 63 Vict. Ch. cclxvi; Special Report of London County Council under

of condemning land in excess of what it actually needed for the proposed street. Such land could be taken to recoup the cost of the undertaking, to protect the improvement, and to secure sites for rehousing the persons who would have to be displaced. The land thus condemned in excess could be sold or leased at any time within sixty years, and such resale or lease could be made subject to such protective restrictions as to the use of the land as the council might deem it wise to impose.[77] All persons of the laboring class who were dishoused in the course of constructing the improvement were required to be suitably rehoused by the council within a radius of one mile from their previous location. And finally, a special assessment might be levied upon adjacent benefited lands. This assessment was to be three per cent per annum upon one-half the estimated enhancement in the value of such land. The benefited property was to be valued before the improvement was made and after the accretion in value had taken place. If the owner was dissatisfied with the amount of the assessment he could compel the county council to purchase his property at the figure stipulated in the initial valuation.

Clothed with these powers the county council entered upon the gigantic undertaking of carving out a new thoroughfare in the heart of London. The street itself was about three-fifths of a mile in length and one hundred feet wide. About six hundred properties were acquired and demolished, involving freehold, leasehold and trade interests to the number of nearly fifteen hundred. Over

title of *Opening of Kingsway and Aldwych,* published in 1905, gives a full account of the legislative history of this act and a description and history of the improvement itself as it was finally carried through. The report was written by Mr. G. L. Gomme, Clerk of the London County Council.

[77] *Supra,* p. 104ff.

six thousand persons of the working class were displaced and had to be rehoused. The project involved altogether an area of about twenty-eight acres, some fifteen of which comprised a surplus to be leased or sold as building sites.[78]

Careful estimates were made of the gross and net cost of the undertaking. The gross expenditure was set at £4,862,500. Of that sum £120,000 was allowed for the actual cost of the work done and materials used, and £300,000 for the purchase of sites for rehousing persons who would be displaced; the remainder would cover the cost of the land and property condemned and the damages awarded. The council estimated that it would recover, by the disposal of the surplus lands, £4,088,300. The net cost of the whole project upon that basis would be but £774,200.[79]

Although the Holborn-to-the-Strand improvement was formally opened to the public in 1905 and the process of disposing of the excess property has been going on ever since 1902, it is still impossible to state with much accuracy just what the financial outcome of the whole undertaking will finally be. The county council has followed two policies in regard to the disposal of the surplus land. It has sold part of it outright and part it has leased for long terms. A statement, therefore, as to the amount of the recoupment from this land must rest on an estimate of the value of the land which the council still owns. It will be many years before the books can really be balanced and a final statement made of the actual net cost of the project. By 1908, the gross cost of the whole improvement had run up to £5,136,150; then it was still estimated that the recoupment would be sufficient to

[78] *The Opening of Kingsway and Aldwych, op. cit.*, p. 39.
[79] London Statistics, 1899–1900, Vol. x, pp. 226–7.

keep the net cost at £774,200.[80] These estimates do not, however, make any allowance for interest on the money which was borrowed to carry through the work and these interest charges from April 1, 1899, to March 31, 1907, had already mounted up to £662,691.[81] It would seem that for this reason, delay in selling the surplus land will ultimately result in a very substantial increase in the net cost of the improvement.

The experience of the London County Council in disposing of the surplus land which it had taken is interesting in showing the problems which are attached to the administration of a recoupment project. Great difficulty was experienced at first in getting rid of this land. In 1902, 1903 and 1904 the council held public auctions at which these building sites were offered on ninety-nine year leases, subject to certain restrictions upon the use to which the land might be put. At none of these auctions was any land let. By 1907, the council had still on its hands about seventy per cent of the surplus land and had received only about £300,000 from outright sales.[82]

These results seemed somewhat discouraging and the council, feeling that something must be done to make the land move faster, decided to modify its previous policy in the matter of disposing of the surplus. The modifications made were three in number.

In the first place the council decided that it would be expedient to pay commissions to private auctioneers, surveyors and other real estate brokers for their services in securing purchasers and tenants. It had originally been

[80] *Idem,* Vol. xix.

[81] Report of London Traffic Branch of the Board of Trade, 1908, *Parliamentary Papers,* 1908, Vol. xciii, p. 9.

[82] *Annual Report of Proceedings of London County Council,* year ending Mar. 31, 1908, p. 164.

felt that the council's own officers ought to dispose of the land but, in 1906, it was decided to expedite matters by soliciting the coöperation of private interests. An elaborate scale of commissions was therefore worked out but because of the valuable character of the land these rates were placed at a rather low figure.[83] Private real estate firms were not, therefore, stimulated by these low commissions to much activity in helping secure buyers or tenants for the council's land. These commissions were accordingly increased in 1907, until they were substantially the same as the rates ordinarily obtaining in private real estate transactions.[84]

Some difference of opinion was discovered, in the second place, as to whether the council was asking a reasonable price for the land it wished to sell. Many private valuers and surveyors were inclined to feel that the price set was too high. After due consideration, the council decided that the prices in question were reasonable and were fully justified by the rents obtained from the sites which had already been let. It did, however, decide to adopt temporarily a new policy in regard to the rents asked, with a view to encouraging prospective tenants. Until a certain number of sites should be let and " the commercial character of the thoroughfare thoroughly established," it provided that, " lessees should be allowed to pay the first year a peppercorn rent, the second year twenty-five per cent, the third year fifty per cent and the fourth year seventy-five per cent of the ultimate rental." It was felt that while " it will thus be five years before the council comes into the enjoyment of the full rental

[83] *Annual Report of Proceedings of London County Council*, year ending Mar. 31, 1907, p. 152.

[84] *Annual Report of Proceedings of London County Council*, year ending Mar. 31, 1908, p. 164.

of such sites, it will sacrifice nothing of the ultimate value of the land." [85]

The council felt constrained, in the third place, to modify to some extent the restrictions which it had set out to impose upon the future use of the land it was putting on the market. These restrictions had been more burdensome than those obtaining in private estates generally, and prospective buyers or lessees were reluctant therefore to acquire sites which were subjected to these rigorous building conditions. The council decided, accordingly, to change these restrictions as much as it could without disregarding its own interests in the adequate protection of the improvement.[86]

It is clear, from these concessions which the council made, that there were unforeseen difficulties involved in the disposal of the excess land which was condemned. But the consensus of opinion would seem to be that those problems have been met on the whole successfully, and that the results of the entire Holborn-to-the-Strand improvement will ultimately be quite satisfactory to the government from the financial standpoint.

There is some question, however, whether it is fair to assume that other projects which might be undertaken would work out with as little difficulty and loss as this one.

It is the opinion of Mr. Andrew Young, valuer to the London County Council since 1889, that while there might be areas in London where the recoupment on an excess condemnation project would be as large, there are not many. This is due to the fact that while a large portion of the property acquired in the Holborn-to-the-Strand improvement was not of much value in itself, the

[85] *Idem*, p. 164.
[86] *Idem*, pp. 164–165.

sites formed by the construction of the new thoroughfare were of very great value indeed.[87]

There is little disposition, however, to abandon the policy of recoupment in connection with public improvements in London, and the act of 1914, which authorized the construction of the Mall Approach, confers upon the Westminster City Council powers of excess condemnation almost identical with those under which the Holborn-to-the-Strand project was carried through.

London is not the only English city in which the policy of excess condemnation for recoupment has been put into practice. There are numerous instances of its use in the larger industrial and commercial centers particularly, and the results attained vary widely from place to place.

In Manchester, the financial results of certain early projects of excess condemnation were rather unfortunate for the city. In 1894 Mr. George Clay, Alderman of Manchester and Chairman of the Improvements and Buildings Committee of that city, testified before the Select Committee of the House of Lords on Town Improvements that there had been but one instance in which the policy of recoupment had not resulted in loss to the city: [88]

I should say we have some £300,000 worth of vacant lands on our hands at the present time. . . . I may say Manchester, with regard to recoupment, thought they were wise in their time, and twenty years ago, went in for buying more land than they wanted for making a new thoroughfare. In 1875 they got parliamentary powers to do that. Where the gross expenditure was half a million of money, the receipts for land up to the present time are about £113,000; and after

[87] Report of Royal Commission on London Traffic 1906, *Parliamentary Papers,* 1906, Vol. xliii, Questions 7233–7234.

[88] Alderman George Clay, *Report of Select Committee, op. cit.,* Questions 783–795, p. 55.

taking into consideration the value of the lands that are unsold, at the present selling price of land, we have sustained in that transaction a loss of about £300,000.[89]

Land values seem to have fallen heavily in Manchester during the years following the taking of large areas of excess land, and the city found itself in most cases unable to sell at all, in other cases unable to sell at a figure high enough to break even on the investment. In many cases land still remained unsold for twenty or twenty-five years, during all of which time the city paid interest on the purchase price of the land without receiving any taxes from it.

The experience of the city of Leeds with excess condemnation stands in striking contrast to that of Manchester. This is indicated by the testimony before the select committee just referred to of Mr. John Barran, Member of Parliament from Leeds.

The principle on which we acted in street improvements in Leeds was, that when we applied for our act of Parliament we invariably took a pretty wide line of deviation for the purpose, as far as possible, of securing property on the line of improvement by which we might recoup ourselves. In every instance where we extended our operations beyond the line needed for the street improvement, I think I may say, in every instance, we found that by purchasing the property we were enabled to make the improvement at a very much less cost than we should have done if we had taken only so much of the buildings as were necessary for the purpose of widening the streets. There were several instances where nearly the whole of the cost was recovered by the resale of the property.[90]

All of the surplus land taken by the city of Leeds was sold

[89] *Idem*, Question 786.

[90] *Report of Select Committee, op. cit.*, Question 3561, p. 278.

at public auction. Mr. Barran attributes no small part of the financial success of these projects to the fact that the city did not continue to hold the surplus property for a long period of years, but disposed of it as quickly as possible.[91] Market conditions were apparently much more favorable in Leeds than in Manchester.

No attempt has been made in these pages to treat exhaustively the cases in which cities in the various parts of the world have made use of excess condemnation as a means of making or saving money. The projects which have been described are, it is believed, fairly typical. They indicate under how many different circumstances, in how many different ways and with what different results cities may make use of that policy. The facts presented will not support any dogmatic or categorical statement as to whether or not excess condemnation is or is not successful. Success or failure depends upon a wide variety of factors. It has been seen that in some cases, as in the Northumberland Avenue project in London, not even very gross dishonesty and maladministration on the part of the public authorities could eat up all the profit accruing to the city by recoupment; while in other cases, as in the upper end of the proposed Carnegie Avenue extension in Cleveland, even assuming one hundred per cent efficiency and good business judgment, the city could not fail to lose.

Before attempting to draw any conclusions regarding the value of excess condemnation as a financial measure, before attempting to weigh it in comparison with the other schemes for intercepting the increment of value created by public improvements, a closer analysis must be made of the factors which actual experience has shown will tend to make it succeed or fail.

[91] *Idem op. cit.* Question 3592ff.

CHAPTER V

FINANCIAL GAINS AND RISKS OF EXCESS CONDEMNATION

WHEN a city employs excess condemnation for the purpose of controlling remnants of land or of protecting the beauty and usefulness of a boulevard or park, its primary motive is not financial, and yet nearly always it entertains the hope that it will make some profit from the resale of land which it took for an entirely different purpose. It certainly looks with great concern upon the financial aspects of the undertaking, and if the excess land cannot be disposed of at an actual profit it is felt that it must at least bring in as much as the city paid for it. When, on the other hand, excess condemnation is employed for the primary purpose of making money, the financial results obtained are the only ones that matter; since a money loss to the city would not, under such a policy, be offset by any practical or esthetic gain in the nature of a wise safe-guarding of the attractiveness and convenience of public improvements. There is, in short, no project of excess condemnation, no matter what its purpose may be, in which the financial outcome of the undertaking is not a matter of deep concern.

The foregoing chapters have described briefly the leading instances in which excess condemnation has anywhere and for any reason been put into practice. In each case the general financial result of the project has been indicated. Perhaps the most definite and accurate conclusion which can be drawn regarding the money-

making power of excess condemnation is that sometimes it is financially profitable and sometimes it is not.

It is proposed in the present chapter to enter upon a consideration of why excess condemnation sometimes results in a profit and sometimes results in a loss, to indicate the factors in it which make for financial gain and the risks that are involved. It will then be possible, perhaps, to reach more definite conclusions as to when and under what conditions it is reasonable to expect that excess condemnation will really serve as an effective financial policy. The occasional repetition of facts already presented will doubtless be more than justified by the added clarity and concreteness which they give the discussion.

The source of financial gain in excess condemnation projects is, of course, the resale or leasing of the land which has been condemned in excess of the actual needs of the city.

It is unnecessary, at this point, to enter into any elaborate discussion of the reasons why a profit may accrue to the city from this source. It proceeds upon the assumption, first, that the city condemns the excess land at a fair price approximating its real value; second, that the construction of the public improvement will measurably increase the value of the surplus land so taken; and, third, that the city will sell or lease that land at a figure equal to that increased value.

If a project works out in a way which renders any one of these assumptions false, the whole undertaking may result in serious money loss to the city, instead of gain; and the success, therefore, with which a city employs excess condemnation will depend in large measure upon the extent to which it can control these three factors. Has a city the right to assume that, as a usual

thing, it can so govern conditions surrounding the construction of a public improvement as to acquire excess land at its real value, that by the construction of the improvement it will be able to cause that value to rise, and finally that it will manage to dispose of the land in such a way as to intercept that increment?

In the first place, what reason is there to believe that the city can secure the land which it condemns at a reasonable price? The main reason for so thinking is, of course, that the city has powers which the ordinary purchaser does not have. By right of eminent domain the public appropriates land over the protest of the owner, and pays for it a price fixed usually by some jury, commission or other disinterested tribunal. That price is supposed to represent the actual value of the property. In theory, at least, there is no reason why the city should not condemn such property as it may desire at the fair market value of that property.

At a later point the success or failure with which our cities manage to condemn land at a fair price will be discussed. It is enough to state here, that as soon as a strong public sentiment prevails which protests against paying the owner of expropriated property more than it is worth, merely because it is the public which takes it, so soon will American municipalities be able to enter with a greater degree of safety upon a generous exercise of the power of excess condemnation. Where such a sentiment does exist that policy stands shorn of many of the more serious objections that are urged against it. When a city can condemn land at a fair price, the risk involved in a liberal acquisition of land is reduced to a minimum. Cities that wish to use excess condemnation without danger of financial loss ought therefore to stimulate a general belief amongst their citizens

that to pay a man more for his property than it is worth is just as bad business policy for the city as it is for an ordinary business man.

While it is true that the amount that municipalities pay for land taken by eminent domain is governed in large measure by the sentiment of the community as to what the city may be fairly asked to pay, certain measures have been adopted or proposed in various places to prevent the raids on the public treasury which frequently occur when land is condemned.

In England the city may be given the power to deny compensation for any improvement constructed on private property after the plan of a public work has been announced, when the owner had full knowledge that such improvements would have to be condemned and paid for and purposely constructed them with a view to securing such compensation or damages. Under the act authorizing the Holborn-to-the-Strand improvement, it was expressly provided that the London County Council was to pay no compensation "in respect of any improvement, alteration or building, or in respect of any interest in lands created after June 21, 1898, if, in the opinion of the court, such improvement etc. . . . was made with a view of obtaining increased compensation under this act."[1] This would enable a city to protect itself against a certain type of imposition which, as will be seen later, is common enough. It would pay no damages not fairly

[1] London County Council (Improvements) Act, 1899, Part II, Sec. 8, Chs. 1, 2. The Mall Approach (Improvement) Act, already referred to (supra p. 101, note 25), contained a similar clause. See also Montreal Charter, Sec. 437: "No indemnity or damage shall be allowed for any building, structure or improvement upon any immovable, after notice has been given in the council of the resolution for the purpose of such expropriation, provided that such shall be followed by proceedings in expropriation within the year."

and squarely due to the owner whose property is taken. Those who undertook to create improvements for the sake of having them destroyed and paid for by the city would have their trouble for their pains. For reasons which are mentioned later,[2] however, this is not a power which most of our American state constitutions would permit municipalities in this country to exercise.

The city can further take great care that in paying for property taken by eminent domain for a public improvement it does not include in the amount which it pays any compensation for the increase in the value of the property which is expected to result from the improvement. It will pay, in other words, for just what it takes and, on the theory that a man cannot lose what he never had, it will not pay for a value an owner might have had if he had been left in undisturbed possession of his property. A firm stand taken by the city upon this point will help to withstand the onslaughts of those who feel that the city ought to pay them for their property some portion at least of the increase in its value due to the public work created by the city.

A suggestion has been made by an eminent English authority on town planning which, if adopted, might help to solve the problem of fixing upon a fair value at which to pay for land taken by eminent domain.[3] This plan is to pay an owner the amount of the value which he places upon his property for purposes of taxation. If he overvalued it his taxes would be too high; if he undervalued it his compensation, in case the city took the land, would be too low. Motives of self-interest would lead him to place a fair value upon it. In the United States, however, property owners are not asked to value their

[2] *Infra*, p. 195ff.
[3] Nettleford, J. S., *Practical Town Planning*, p. 207.

property for taxation, and there is a serious question whether the assessments made under the unique and inadequate system prevailing in this country could safely be made a guide for the awarding of compensation in cases of eminent domain. The owners of a great deal of the land in a municipality would be quite safe, furthermore, in assuming that their land would never be taken by the city; while, in those cases where a public improvement is agitated for years, the owners of the property affected would have time to secure an increase in their assessments. It is doubtful if the plan would give thoroughly satisfactory results.

It is clear, therefore, that a city is not entirely helpless in the matter of the price which it will pay for land which it condemns. Whether or not that price will be fair and reasonable will depend upon the vigor and sense with which the city controls the process of awarding compensation, and that in turn depends in the last analysis in very large measure upon the degree to which the citizens who own property are willing, as a general rule, to meet the city halfway. If public sentiment is not interested in protecting the public treasury there is little likelihood that it will be adequately protected. But in any case experience and a knowledge of local conditions will enable alert city officials to determine, before entering upon an extensive project of excess condemnation, whether or not the cost of acquiring the land involved will be so high as seriously to reduce the expected recoupment.

The financial effectiveness of excess condemnation, as was suggested, depends in the second place upon the amount of the actual accretion in the value of the surplus land taken by the city. The city must assume that such an increase in land values will be caused by the public improvement in contemplation. Otherwise there

would be no shadow of an excuse for its condemning for recoupment land in excess of its ordinary needs.

To say that the creation of a valuable public work, a street or park or bridge, does raise the value of the neighboring property seems almost a truism. The whole system of special assessments proceeds upon the assumption that the property abutting a public improvement is measurably benefited thereby. In fact, if a man can show that his property is not benefited, he will be relieved by the courts of the necessity of paying an assessment.[4] The fact that special assessments are levied in almost every American city to pay in part for almost every street improvement is evidence, therefore, of the fact that public works do increase the value of the surrounding property.

If further proof of this fact were needed, it would be found by examining the successive appraisals of property appearing upon the city tax assessment lists. Such a study will indicate that in general, when costly public improvements are made, the value of the nearby property is definitely increased for purposes of taxation. In fact, it is generally understood that this increase of the neighboring real estate values will bring into the city treasury in a few years, in the form of increased taxes, an amount sufficient to pay the cost of the improvement and sometimes pay for it several times over. Mr. Nelson P. Lewis, Chief Engineer of the Board of Estimate and Apportionment of the city of New York, is authority for the statement that, "during the sixteen years following the laying out of Central Park, the average increase in the assessed value of real estate in other parts of New

[4] This is a theoretical rather than an actual protection for the most part, since no standards of evidence exist in practice by which a man may support his claims.

York City was about one hundred per cent, while in the three wards then adjoining the new park the increase was approximately eight hundred per cent."[5]

The increase in the value of land adjoining a public work is not so inevitable, however, as to free a city which contemplates using excess condemnation of the necessity of using foresight and caution. At a later point it will be seen that the expected accretion in real estate values does not always follow the completion of a public improvement, even though that improvement be in itself of great public benefit. A city, therefore, must take into consideration whether conditions are such that the project in connection with which it proposes to condemn land in excess will actually raise land values nearby to an appreciable degree.

It is not always possible to state in advance just what the effect of a public improvement will be in this direction. For this reason every excess condemnation project is to a certain extent a speculative venture. It is speculative beyond the power of the city to regulate and control the results. There are, however, certain conditions under which public improvements will increase the value of neighboring lands with a fair degree of certainty. By making sure that those conditions exist, a municipality can enter upon an application of the excess condemnation principle with a minimum of risk regarding the expected accretion in the value of the surplus land.

When, for example, new and desirable building sites are made available in a portion of a city already congested, there is little question that the area comprising those sites is much more valuable than before. It was

[5] Quoted from a public address in *24th Annual Report of City Parks Association of Philadelphia.*

quite possible to foresee with certainty that such a result would follow the opening of that portion of the Carnegie Avenue extension, earlier discussed, which lies near the business center of Cleveland.[6] This street opening would place upon the market new frontages and corner sites in a section where they were sorely needed. It seems certain that this property abutting the new street, which it was proposed the city should acquire, would be many times more valuable after the improvement was completed than it was before. The same was true of the new plots opened up by the Holborn-to-the-Strand improvement, the Montreal street extensions, as well as many other public works already mentioned. The opening, for instance, of a park or boulevard will stimulate a demand for the adjoining property because people will wish to build residences in so attractive a place. If the city should construct a bridge or docks or wharves or other terminal transportation facilities, land would immediately become highly desirable for various industrial or commercial purposes. The city in all these cases is creating an improvement near which, by its very nature, people wish to be. It may feel fairly certain that land which it may condemn adjoining improvements of this kind will undergo a marked increase in value.

There are circumstances, furthermore, under which almost any public work will raise property values in the vicinity. These are times of prosperity when the real estate market is vigorous and the community is growing steadily. The demand for attractive and convenient building sites is apt to be greater than the supply, and land values are quick to respond to the influence of any improvement which renders available the building sites needed by the growing community. When these favor-

[6] *Supra*, p. 141.

able conditions prevail, it is most unlikely that a municipality would find that land which it had taken by excess condemnation when constructing a public improvement, did not grow to be worth a good deal more than its original value.

It is quite true that these conditions may not be the only ones under which public improvements will cause neighboring land values to rise. Land values are somewhat erratic and will sometimes soar or fall when least expected or when such a result has been in serious doubt. But when a city enters upon an excess condemnation project, and realizes that it will lose money if the hoped for accretion in property values does not materialize, it ought to be unwilling to take doubtful risks. It is quite possible, however, to determine with a fair amount of accuracy whether any or all of the conditions outlined actually exist. If they do exist, the city may feel reasonably sure that the land adjoining the proposed improvement will increase in value to such an extent as to render fairly certain the profitable resale of the excess area condemned.

If a municipality succeeds in condemning in excess at a fair price an area of land whose value is substantially enhanced by the creation of a public improvement, it must still dispose of that land. It must dispose of it, furthermore, at a price representing its new and increased value.

Here, again, the city may not always be able to foresee with definiteness the precise outcome of a given project. By right of eminent domain it may compel a man to sell his property at a fair price; there is no power by which it may compel a man to buy. In entering upon an excess condemnation project a municipality always assumes in some degree the risk of not being able to find purchasers

who will buy its excess land at a figure representing its real value.

When the city, however, by creating a public improvement, actually increases the value of such surplus lands as it has condemned, there must be at least a potential demand for the property at the higher figure placed upon it. Ordinarily such a potential demand is found to be an actual demand, if reasonable care is taken to make known the desire of the city to dispose of the land.

By offering such lots at public auction or by asking for bids upon them, the city can readily discover the condition of the market. If the offers received are not as high as the value which the city has placed upon the property, one of two inferences may be drawn. Either conditions generally are unfavorable for a sale or the city has overvalued the land. In normally favorable circumstances, however, the city may reasonably hope to find buyers who will be willing to pay a fair market price for such excess land. If a municipality can condemn land at a reasonable price, and produce by its own enterprise an increase in the value of that land, it need not, as a general rule, regard as very serious the risk of failing to find purchasers for the land at its new or enhanced value.

From this discussion of the factors which make for financial success in projects of excess condemnation, the whole scheme seems perhaps to be easy enough of effective manipulation. The same degree of business efficiency which makes for the satisfactory management of the other affairs of the city would seem to promise the most favorable outcome of such excess condemnation undertakings as the city might enter upon. But all is not so simple. A careful study of the instances in which

this policy has been put into practice indicates that its actual operation is attended by risks which are neither few nor insignificant. It is safe to say that scarcely a single project of excess condemnation has been carried out in which the city has not found itself confronted sooner or later by unforeseen difficulties imperiling, in greater or less degree, the financial success of the undertaking. No examination of the financial aspects of excess condemnation can be complete which does not take into account these difficulties, and does not set over against the probabilities of financial success, the heavy cost of the enterprise and the risk of money loss.

In the first place, an application of the principle of excess condemnation involves a serious financial risk because it almost invariably necessitates a large expenditure of money or outlay of credit. There is no uncertainty about this; the land condemned in excess must be paid for and paid for promptly. Even under the most favorable conditions by far the largest portion of the money which the city receives when it resells the surplus property must go to reimburse the public treasury for expenditures already made. Every excess condemnation project calls for a heavy initial investment of the city's money.

Naturally the mere size of an investment does not necessarily increase the risk of loss any more than it does the chance of gain. The more money a city spends in condemning excess land, however, the more imperative it is that the undertaking shall turn out favorably. When, therefore, the city undertakes a project involving the outlay of several million dollars, every risk and leakage and slipshod method of administration becomes fraught with unwonted danger.

Of vastly greater importance than the mere amount

of the cost of condemning excess land is the relation which that cost bears to the probable return from the resale of that land. Any factors, therefore, which tend to increase the initial expenditure of money by the city without at the same time increasing the amount which may be recovered into the public treasury, constitute risks too serious for the city to ignore. There are several conditions under which cities are likely to find the outlay of capital or credit required for an excess condemnation project increased without any proportionate gain in the expected recoupment.

A municipality may, for example, undertake to condemn land in excess in a portion of the city where land values are already exceedingly high. This is likely to be the case when a street is widened in a crowded district. The need of widening in itself usually bespeaks an intensive use of the land. Any surplus which the city condemns in connection with such a project it must therefore pay for at congestion prices. Land values may already be so high as to be well-nigh beyond the influence of such a public improvement to raise them greatly. It is exceedingly doubtful whether the widening of many of the narrow crosstown business streets of lower Manhattan would have any appreciable effect in enhancing the already enormous values of the abutting property. In attempting to use excess condemnation as a means of financing improvements of this general character a city would be making the maximum outlay of capital or credit with a minimum opportunity for recoupment. There are some students of the problem who believe, for this reason, that excess condemnation cannot wisely be utilized as a financial measure in connection with costly improvements in the built-up and congested sections of the city.

A second factor which tends to increase the cost of condemning land in excess without increasing likewise the price at which the city can sell such land is the practice almost universally prevalent of paying for land taken by eminent domain more than its fair value. While it has already been indicated that it lies in the city's power to mitigate some of the abuses of this kind which are continually taking place, the only real remedy for the evil lies in the educating of public opinion. Theoretically, in the eye of the law, the city pays a fair price for the land it condemns; actually it pays a good deal more. Those who have in charge the planning of excess condemnation projects will do well to recognize that there is always a danger that the estimated profits of the undertaking will be eaten into by the lavish awards made by condemnation juries and arbitors.

There seems to be a general sentiment in almost every community in favor of the payment of a very liberal price for what the city takes from a citizen. There is no one who has a direct pecuniary interest in making sure that the city pays no more than it should. In England, the custom grew up of paying the owner of property which the public needed in a project of recoupment, not only the liberal award made by the land jury, an amount usually well above the price the land could bring in open market, but also an additional ten per cent. This bonus was supposed to compensate the owner for being compulsorily dispossessed of his land. It was never recognized by law. The result of the practice was, of course, a rather serious reduction in the amount of profit which the public authority was able to make by the sale of the surplus land.[7] Mr. Meyer, in his report already referred to on the operation of excess condemnation in

[7] Mass. House Doc. 228 (1904), p. 65.

Paris,[8] states that the excessive awards made by juries were the main cause of the Government's inability to recoup. He cites case after case in which the careful estimates of the profit to be made by the city were shattered by the extravagant prices paid for the land condemned. The city entered, for instance, upon the construction of the Bourse de Commerce in the belief that the compensations for the land proposed to be taken would be $5,000,000. The amount actually awarded amounted finally to $8,000,000.[9] It is useless to duplicate examples of this practice of over-paying for private property taken by eminent domain. Few indeed are the European or American municipalities which could not from their own experience contribute to such a list. And in so far as cities allow themselves to pay more than a fair price for property which they condemn in excess, just so far do they imperil the financial success of their recoupment ventures.

The fact that public authorities do as a rule pay fancy prices for the property they take by eminent domain is perhaps responsible for a practice which constitutes a third means of running up the cost of excess condemnation without adding to the returns. This is the practice of creating improvements or property interests for the sole purpose of making the city condemn them. The city of Paris, in making compensation to the tenant of expropriated property as well as the owner, found frequently, according to the statement of a member of the Municipal Council, that, "when it became known that the public authorities were going to take property for

[8] *Municipal Real Estate Operations in Connection with Street Improvements in Paris, London and the Provincial Towns of England,* Mass. House Doc. 288, pp. 53–101.

[9] Meyer, *op. cit.,* p. 60, quoting from *L'Economiste Français,* Sept. 10, 1887.

public use, owner and tenant frequently conspired to bleed the public. On the eve of the official announcement of the proposed taking of land, leases were made for an excessive length of time, and on the basis of a rental which exceeded the current rate by 100, 150 or 200 per cent."[10] Quite as frequent is the practice of putting up cheap buildings or making other physical improvements on land which the public authorities have announced they will condemn.[11] The engineer of the city of Worcester, Massachusetts, writes for instance, in regard to the excess condemnation venture entered upon in that city,[12] "We found with relation to Belmont Street, that no sooner had it been noised about that the city purposed to widen the street than the erection of buildings began immediately within the area proposed to be taken, and largely for the purpose of damages."[13]

It has been suggested above that in England and Canada there is available a means of correcting this abuse. Authority has been given to the city of London and the city of Montreal to refuse to pay damages for the destruction of such improvements, structures or property interests as may have been created in order to secure indemnity.[14] It is questionable whether an American city could refuse to pay damages in such a case. The law of eminent domain in this country jealously guards the property owner against loss, and it is hard to see how the constitutional prohibition against taking private property for public use without just compensation could be construed in such a way as to relieve the

[10] Meyer, *op. cit.*, p. 61, quoting from *L'Economiste*, Aug. 23, 1890.

[11] *Supra*, p. 183.

[12] *Supra*, p. 135.

[13] Letter to the author, dated August 5, 1916.

[14] *Supra*, p. 183.

city of the necessity of paying damages for property taken or destroyed, even if such property was deliberately created in order to make the city condemn it. American municipalities may, perhaps, be able to improve their system of condemnation proceedings so as to reduce to a minimum the time between the announcement of a plan of improvement and the actual taking of the land. This would help to render impossible the creation of any very valuable improvements during that period. Unless this can be done, however, the cities of this country must count as one of the financial risks of excess condemnation the possibility of having to pay heavy damages on property created for the express purpose of having it destroyed and paid for.[15]

The cities of England and France find the net cost of using the excess condemnation increased, or the net profit reduced, by reason of heavy charges from which American cities are exempt. These charges are the payments which are made to indemnify owners or tenants for the destruction of trade interests or the goodwill of their business. In other words, the city not only pays

[15] There seems to be no pronouncement by an American court upon this precise point. In several states, however, statutes have been enacted permitting the creation and announcement of an official street layout and refusing damages for the destruction of any building or improvement subsequently constructed within the lines of any such officially plotted streets. With the exception of Pennsylvania, such a refusal to pay damages has been held unconstitutional in every state where the question has arisen, on the ground that it permits the taking of private property for public use without just compensation. It is hard to see any vital distinction between these acts and the laws under discussion above, which deny damages for the destruction of buildings, improvements or property rights deliberately created after the announcement of a plan for public improvement for the purpose of securing such damages. Lewis, *Eminent Domain*, 3rd Ed., Sec. 226; Nichols, *Eminent Domain*, Sec. 42.

the owner a fair price, and frequently much more, for such property as it needs to condemn, but it also pays the man who has been carrying on business on the premises for the injury he sustains by reason of having to move, and for the loss, if he is merely a tenant, of his leasehold rights.

The experience of English cities in particular in the payment of these so-called trade compensations indicates first that they are usually exceedingly large, and second that the juries awarding them follow the usual extravagant policy of giving the claimant a good deal more than he ought to have. In fact the practice very generally prevails of paying for the total destruction of the goodwill of a merchant's business, even when the goodwill is but slightly impaired.[16] The testimony presented before the Select Committee of the House of Lords on Town Improvements (Betterment), in 1894, was almost unanimous that the various recoupment projects undertaken in London, Manchester and Liverpool up to that time had failed to result as profitably as had been expected because of the high cost of acquiring these trade interests.[17] The belief seems also to prevail that the Northumberland Avenue and Holborn-to-the-Strand improvements resulted more profitably than was usually the case, because in neither instance was it necessary to condemn valuable trade interests.[18] The final conclusion

[16] Mass. House Doc. 288, p. 72.

[17] *Report of Select Committee of the House of Lords,* Question 1384, p. 109, Testimony of Mr. Charles Harrison, Vice-chairman of the London County Council; Question 783–795, p. 55, Testimony of Mr. George Clay, Alderman of the city of Manchester; Question 3546, p. 277, Testimony of Mr. H. E. Clare, Deputy Town Clerk of Liverpool; Question 213, Testimony of Mr. H. L. Cripps, Parliamentary Agent for the London County Council.

[18] Edwards, *History of London Street Improvements,* p. 11, Report of the London Traffic Branch of the Board of Trade,

of the select committee regarding recoupment was, as already stated,[19] that it seemed never to have been tried "under circumstances calculated to make it successful, inasmuch as no sufficient power has ever yet been given to local authorities to become possessed of the improved properties without buying out all the trade interests, a course which is inevitably attended with wasteful and extravagant expenditure." [20] In 1906, Mr. Andrew Young, Valuer to the London County Council, expressed himself as being "clearly of the opinion that the only economical method of carrying out street improvements in London is by laying out the projected new streets in such a way that it would not be necessary to acquire a large proportion of valuable property occupied for business purposes." [21]

Obviously when a city pays for these trade interests it buys something which it cannot resell. It does not pay for value received but for value destroyed. The necessity of making these heavy expenditures for trade compensations has long been a matter of great concern to those authorities who have faced that necessity in connection with recoupment projects. One of the arguments advanced by the Prefect of the Seine for farming out the power of excess condemnation, in the manner already described in connection with one or

Parliamentary Papers, 1908, Vol. xciii, p. 9; *Report of Select Committee, op. cit.*, Questions 344–348, p. 27, Testimony of Mr. Cripps, Member of the Metropolitan Board of Works and Parliamentary Agent of London County Council; Report of Royal Commission on London Traffic, *Parliamentary Papers*, 1906, Vol. xliii, Testimony of Mr. Andrew Young, Valuer to London County Council, Questions 7233–7234.

[19] *Supra*, p. 167.

[20] *Report of Select Committee, op. cit.*, pp. iii–iv.

[21] *Report of Royal Commission on London Traffic, op. cit.*, Vol. xli, Appendix No. 12, pp. 315–318.

two French projects,[22] was that a private contractor, being able to agree to reinstate a dispossessed owner in a site near his former location, would avoid paying heavy indemnity for the destruction of goodwill.[23] In England, two plans have been suggested to reduce this heavy burden of expense. One is the policy of taking by eminent domain only the fee to the land or the long leasehold interests, and allowing the occupants holding short-time leases to remain undisturbed until those leases expired. This would be of some help but would save the payment of only part of the trade compensations. It would not, however, apply at all to occupant owners. It would place the public authority, furthermore, under the necessity of delaying the work of improvement until these short-time leases expired. Although this policy has been followed in some instances, it has never been put into general practice.[24] A method more recently employed for keeping these trade compensations down is the entering into agreements with those holding the most valuable trade interests, to reinstate them nearby on a site practically as desirable as the one they originally possessed. In connection with the construction of the approach to the Mall, for instance, a private owner was given an option on the land taken from him, which was in excess of the city's actual needs, unless it should be required for a public

[22] *Supra*, p. 150.

[23] Robinson, *City Planning*, p. 262, note.

[24] In 1897, the county council acquired the freehold in a large block of buildings between Southampton Row and Kingsgate Street. The leases in these buildings had but five years to run, and the county council, by leaving them undisturbed and thereby avoiding the payment for the trade interests, was able to put through its improvement at about half the amount it would otherwise have paid. Edwards, *History of London Street Improvements*, p. 173.

purpose. As consideration for this option the owner waived all claim to compensation for destruction of trade interests. In due time he exercised this option and purchased back part of his former holdings together with some adjoining parcels. When it became necessary later to displace him from this site, the authorities entered into another agreement to reinstate him on a nearby site which they condemned. Thus no expenditure was made for trade compensation and a large amount of money saved to the taxpayers. The last reinstatement mentioned was bitterly fought by the former owner of the reinstatement site. The select committee approved the county council's action, however.[25]

The power given the local authorities in connection with several recent projects of improvement not only to sell or lease land condemned in excess but also to exchange it, gives some opportunity, at least, to reduce these heavy damages to trade interests.

The financial results of excess condemnation are imperiled not only by those influences which tend disproportionately to increase the cost of acquiring the excess property, but also by the burden of heavy fixed charges. These are expenditures which eat into the expected profit from the undertaking with relentless certainty, and they are expenditures which mean just so much net loss to the city.

The fixed charges incidental to excess condemnation projects are, of course, interest charges. A municipality almost invariably resorts to an issue of bonds in order

[25] A full account of this interesting case will be found in the Report of the Select Committee of the House of Commons on the Mall Approach Improvement Bill, *Parliamentary Papers*. 1914, Vol. viii. At the time of writing it is not known whether the scheme was finally carried through, although the bill was passed by Parliament.

to get any public improvement started. There are many instances in which the interest on the money thus borrowed constitutes a fairly unimportant item of expense. This is the case when the interest rate is low and when the city quickly sells the surplus land at a price which enables it to liquidate the loan at once or to make a sinking fund investment which will carry the annual interest charges. But when the interest rate is high or when the city finds it necessary for any reason to retain possession of the excess land for a long time, these annual payments will act as a severe and steady drain upon the amount of the profit which the city can hope to make when it does dispose of that land.

This is a point which scarcely needs illustration. It has already been suggested that the interest charges on the capital investment in the Holborn-to-the-Strand project were very high. The London Traffic Branch of the Board of Trade declared in 1908, that in estimating the net cost of this improvement at £774,200, the London County Council "have not considered the effect of delay which may occur in the disposal of the surplus land, nor has allowance been made for interest on the outlay. The net charges for interest from the 1st April, 1899, to 31st March, 1907, amounted to £662,691." [26] The discouraging losses which the city of Manchester suffered in its recoupment ventures were aggravated by the fact that the city was obliged to pay heavy interest on its land investments for a long period of time. Mr. George Clay, Alderman of the city of Manchester and for ten years Chairman of the Improvements and Buildings Committee there, declared in speaking of these projects, "There is nothing which eats its head off so much as land does if

[26] Report of London Traffic Branch of the Board of Trade, *Parliamentary Papers*, 1908, Vol. xciii, p. 9.

you keep it long enough." He estimated that the interest payments had practically doubled the loss which the city sustained by reason of its taking the excess land.[27]

A third loss which a municipality sustains in using excess condemnation is the loss of taxes on the land which it appropriates. As in the case of interest charges, this loss will not prove to be serious unless the value of the land is high and the period of tax-exemption protracted. If a city is sufficiently enterprising, it may be able to use the land it has taken in excess of actual needs in such way as to derive some income from it. Unless it definitely contemplates holding the land for a period of years, however, a city is not likely to put it to any temporarily profitable use. The loss of taxes must, therefore, in most cases be added to the other fixed charges as a steadily accumulating net loss.

Those financial risks attendant upon the operation of excess condemnation, which have just been discussed, have been risks arising out of the increases of the gross cost of the undertaking. They are capable, to some extent at least, of being foreseen and provided for and, if careful study indicates that they will be burdensome, the city has still time to refuse to embark upon such a venture. Since they are not accurately measurable, but are inclined to fluctuate unexpectedly, they must still be regarded as risks, and, as experience has shown, risks of no slight moment. They cannot, however, be regarded as highly speculative risks, in the sense that they are governed by circumstances largely beyond the control of the public authorities promoting the scheme.

[27] *Report of Select Committee of the House of Lords on Town Improvements* (Betterment), 1894, *Parliamentary Papers*, 1894, Vol. xv, Questions 783–795.

There is, however, a fourth group of financial risks incident to the condemnation of land in excess which are in a large degree speculative in character. These all group themselves around the possibility that the city may not be able to dispose of the surplus land it has taken, in such a way as to recover the amounts expended in acquiring and improving that land. The expected increase in the value of the surplus property may not take place at all; or it may be so long a time in making itself felt that before the city has secured the accretion in value, the interest charges and loss of taxes will have wiped out any net profit otherwise possible. There are a number of causes which may contribute to the postponement or total failure of the hoped for rise in the value of such land.

In the first place, there may be a general and persistent depression of the real estate values. Increases in land values, as a general rule, depend upon a stimulation of business or an increase in population sufficient to create a demand for new sites or new uses for old sites. Such a stimulation may not take place; and instead of rapid and steady development, a city or a section of a city may merely stagnate. Testimony offered before the Select Committee of the House of Lords on Town Improvements indicated that this stagnation occurred in Manchester, and was responsible for the heavy losses which, it has been seen, resulted from the recoupment ventures entered upon by that city some thirty-five or forty years ago.[28] In that case, after the public authorities had condemned several zones of excess land, the values, so far from rising, actually fell; and at the end

[28] *Op. cit.*, Testimony of Mr. Theodore Sington, Questions 2810–2819, p. 215; Testimony of Mr. Bridgford, Questions 3042–3047, p. 236.

of a period of twenty years, the corporation found itself in possession of property valued at less than the amount at which it was purchased, and for which, even at that lower rate, there seemed to be no demand. Improvements of very great value to the community as a whole seemed to be powerless to prevent a general shrinking in the value of the surrounding property. It was the opinion of the witnesses describing these circumstances that it was entirely impossible to foresee this depression in land values at the time of entering upon the projects involved. It is, of course, easy to say that conditions such as these are exceptional and could not seriously be expected to occur in the average American city. This is probably true. One may well bear in mind, however, the collapse of the real estate market in some of the "mushroom" towns in our western states. In New England there are, to-day, towns and cities which do not have the population and prosperity which they enjoyed in the days of the Revolution. In some of the most rapidly growing cities, the business centers have shifted, sometimes with startling rapidity, leaving behind a district in which land is worth a good deal less to-day than it was ten years ago.[29] The chance is not wholly negligible that a municipality may suffer unexpected loss in an excess condemnation project because general business conditions either prevent any accretion or cause a shrinking in the value of the surplus land it holds.

While this stagnation or depression in land values may be permanent in some cases, there are, in the second place,

[29] This is what has happened on Manhattan. The business center, located ten or fifteen years ago in the Twenty-third Street district, has moved uptown to the Thirties and Forties, and the depression in land values in the abandoned section has been very marked. This tendency would be checked by an adequate system of zones for residential and business purposes.

other instances in which it is temporary, and where the loss sustained arises chiefly from the unforeseen prolongation of the period during which the city must carry interest charges and suffer the loss of taxes. There are frequent cases in which cities have been obliged to wait a considerable length of time before making a profitable sale of the land they have taken. This seemed to be the general experience of the cities of Belgium. "The city officials of Brussels state that in case of any great public improvement, either the construction of a new thoroughfare or the remodeling of a section of the city, a period of eight years or more must elapse before the people adapt themselves to the new conditions, and the city and the property owners there receive the benefit expected from the change. They seem to attribute this to the slowness of their people, the sluggish Flemish temperament, etc., yet the experience of London and Paris furnishes many instances of exactly the same results, so that it may well be accepted as a fundamental rule in such matters."[30] The city of Montreal has met with conspicuous success in disposing quickly and profitably of lands condemned in excess.[31] In 1913, however, the construction of St. Joseph Boulevard was undertaken, at a cost for land condemnation of $2,500,000. Five hundred and fifty-six thousand out of a total area of 794,000 square feet are to be resold for recoupment. The chairman of the Board of Assessors states that, "owing to the disturbed condition of the real estate market, as the result of the war in which we are engaged, it has been thought advisable not to attempt to sell the residues until such time as the market assumes a normal condition . . . so that the loss of interest and taxes will

[30] Edmund M. Parker. Mass. House Doc. 1096 (1904).
[31] *Supra*, p. 143ff.

make a serious inroad into any prospective profit." "This, however," he adds, "may be considered accidental, as the result of abnormal conditions."[82] It is safe to say that any policy or circumstance which postpones the time at which a city can sell profitably the excess property it has taken, constitutes a serious menace to the financial success of the whole project.

There is still another reason why the hoped for increase in the value of the property which a city has condemned in excess may never take place, or may arrive too late to prevent serious financial loss. It is quite possible to construct a costly public improvement of utmost value to the community at large, which does not measurably increase the value of the adjoining land. The clearest example of such an improvement of this kind is the through traffic thoroughfare, opened perhaps through a residential district, for the purpose of putting two business districts into easier connection with each other. Those who are actually benefited by such an improvement are not the residents whose lots abut the thoroughfare, but the property owners at either end, whose places of business are made accessible. This was clearly shown in the case of a bridge constructed, some sixty years ago, in the city of Manchester.[83] This bridge across the River Irk gave, to an important suburb of Manchester, direct and easy access to the business center of the city, the Exchange and the railway stations. The property through which the approaches to the bridge had to be cut was very old. Although an enormous amount of through traffic passed over the new highway, the con-

[82] Mr. J. Hamilton Ferns, Chairman, Board of Assessors, in letters to the author dated 24th February and 11th March, 1916.

[83] Described in the testimony of Mr. Theodore Sington, before the Select Committee of the House of Lords, *op. cit.*, Question 2819, p. 217.

struction of the improvement had no apparent effect upon the value of this property. Forty years saw it in the same condition in which it was when the bridge was built and without a single new building upon it. This is precisely the result which, it was seen above, was predicted as the outcome of the opening of one end of the Carnegie Avenue[84] extension proposed in Cleveland. It was estimated that the use of excess condemnation in connection with the opening of the thoroughfare from East Eighty-ninth Street to East One Hundredth Street would mean a net loss to the city. The improvement itself would be of great public value. It would bring an outlying district within reach of the business center of Cleveland, and would also relieve congestion of traffic on some of the other arterial thoroughfares. But it could not be expected to cause any marked increase in land values in the pleasant residential district through which it passed. This was not the district which would be benefited, and such measure of enhancement in the value of the abutting property as might actually take place would be insufficient to prevent a loss should the city venture upon a policy of excess condemnation.[85] It is apparent, therefore, that the promoters of excess condemnation projects who proceed upon the assumption that every public improvement will, under normally favorable conditions, bring about a striking increase in the value of the immediately abutting property, are neglecting a consideration which may be of most vital importance to the financial success of the undertaking.

It is interesting to note that the character of the re-

[84] *Supra*, p. 138ff.

[85] *Report on Proposed Carnegie Avenue Extensions*, published by Manufacturers' Appraisal Company, Cleveland, Ohio, 1913, pp. 5-6; also letter of Mr. Walter W. Pollock, President of the above company, to the author, under date of May 22, 1915.

strictions which the public authorities place upon excess land, when they sell it, may tend to reduce its market value. Ordinarily, one thinks of restricted property as being especially desirable. When a city, however, imposes restrictions which are exceedingly onerous or when it prevents the future owner from putting the land to its most profitable use, those restrictions operate to reduce the value of the land and may jeopardize the success of the excess condemnation project in connection with which they were imposed. English cities have frequently found themselves involved in this difficulty by reason of the requirement that persons of the working class who are displaced by the construction of a public improvement must be rehoused within a short distance of their former location. This means that a certain portion of the excess land which the city has taken must either be used directly for rehousing workmen or must be sold subject to the restriction that workmen's dwellings be erected upon it. Mr. Andrew Young, Valuer to the London County Council, declares that when " sites are offered for sale subject to the restriction that dwellings for the working classes must be erected upon them, the price realized is only a portion of the commercial value of the land." [36] As proof of this he cited the case of the Holborn-to-the-Strand improvement. The county council was required by act of Parliament to rehouse the workmen displaced within a mile of their former sites. In order to provide homes for 2640 such persons, an area of 139,400 square feet was purchased at its market value as commercial land, at a cost of £200,000. Mr. Young testified that " subject to the restrictions as to the class of buildings to be erected upon it, the utmost price that

[36] Report of Royal Commission on London Traffic, 1906, *Parliamentary Papers*, Vol. xliii, Questions 7166–7168, p. 267.

could be given for it is, in my opinion, £44,000, so that a loss was sustained on this transaction of £156,000."[37] The superintending architect of metropolitan buildings, discussing the same situation, advanced the belief that, had the county council been permitted to rehouse the people displaced in a suitable district beyond the one mile limit, the rehousing could have been done at five-eighths of the cost of the land on which they were placed and at much lower rents.[38] American cities are under neither the requirement nor the temptation to impose restrictions of this kind upon the future use of land which they may condemn in excess. Other types of restrictions, however, will sometimes operate in the same way. It has already been suggested that the London County Council imposed upon the sites fronting upon the Holborn-to-the-Strand improvement limitations as to character and architectural design of the building which might be erected, which were so onerous that it was unable to find buyers or lessees for those sites until those restrictions had been modified.[39] It may be said, in short, that any restriction which places the purchaser of a piece of land under the necessity of using it for a purpose or in a way less profitable than would otherwise be possible, will automatically reduce *pro tanto* the market value of that land, and it may drive away all purchasers. Cities contemplating the resale, under building conditions and restrictions, of land condemned in excess, will need to consider in making their financial calculations the effect which those restrictions will have upon the market for that land.

[37] *Idem*, Question 7176, p. 267.
[38] *Idem*, Testimony of W. E. Riley, Question 7085, pp. 264–265.
[39] *Supra*, p. 104. See *Annual Report of Proceedings of London County Council*, 1908, pp. 164–165.

Perhaps the discussion of risks imperilling the financial results of excess condemnation would not be complete without mentioning the danger of loss arising from the maladministration or the inefficient administration of the system.

There is no intention of suggesting that political corruption and dishonesty are among the necessary risks of carrying through a public improvement project in the same sense in which some of these other dangers constitute necessary risks. They are risks incident to excess condemnation in the same sense in which the cashier's embezzlement is a risk of the banking business. They may occur most infrequently but when they do occur their results may be disastrous. It must be recognized, furthermore, that the administration of an excess condemnation project presents a vast number of opportunities to the public officer for corrupt dealing. It has already been noted that the practices of the Metropolitan Board of Works in London finally became almost a public scandal and led to the appointment, in 1888, of a royal commission to investigate the workings of that body. The facts brought before that body indicate some of the ways in which a city promoting an excess condemnation venture may be fleeced by dishonest and ingenious public officials.[40]

[40] Interim Report of the Royal Commissioners Appointed to Inquire into Certain Matters Connected with the Working of the Metropolitan Board of Works, *Parliamentary Papers*, 1888, Vol. lvi.

It was the belief of Mr. Arthur A. Baumann that the indifferent success of recoupment in connection with London improvements was due to the dishonest manner in which it was administered. He repudiated the view of other students of the question that recoupment would fail because of the heavy cost of acquiring trade interests. *Betterment, Worsement and Recoupment*, pp. 100–101; Testimony before the Select Committee of the House of Lords, *op. cit.*, Question 2662–2707, pp. 204–207.

In the long run, however, it is probable that inefficiency is a far greater menace to the success of projects of recoupment than is dishonesty, and this must be added to the list of financial risks incident to that policy. Most of the dangers already suggested would be very severely aggravated if the officials responsible for carrying out excess condemnation projects were deficient in foresight and general business ability. It is unnecessary to enumerate the various ways in which a municipality may lose money as a result of blunders and poor management in such undertakings. It is safe to say, however, that no city, no matter how efficiently governed, can ever entirely free itself from the risk of such losses.

It may as well be admitted that the danger of inefficient management is probably more acute in the United States than in most of the cities of Europe. The average American municipality elects less able officials than does the European city; it elects them frequently for partisan considerations quite remote from the problems of administration with which they must deal; and it frequently turns them out of office as soon as their experience and their understanding of their duties have begun to ripen. The cities in Europe and in Canada, furthermore, are not free from the restraining influence of a central administrative authority in their excess condemnation as well as their other undertakings. Whether or not one is disposed to approve of such limitations upon freedom of municipal action, there is some reason to believe that ill-advised projects are less likely to be approved by two separate sets of authorities than by one, and that consequently such a check exercised by a central authority appreciably reduces the likelihood that cities will embark upon rash and dangerous excess condemnation projects, American cities, in short, cannot afford to

ignore the fact that their present standards of administrative efficiency constitute in themselves no insignificant menace to the financial results of the policy of condemning land in excess.

Such, then, are the financial risks incident to the operation of excess condemnation. They have been set forth in some detail, not in a spirit of excessive caution nor in the belief that they are all imminent dangers. Some of these dangers might never arise in an American city; it is conceivable, though not probable, that none of them might arise. Some projects could not be rendered unprofitable to the city even by gross abuse and mismanagement. In other instances, the wisest of direction could not protect the public treasury from loss. One cannot get away from the fact that, even under the most favorable circumstances, the financial outcome of an excess condemnation undertaking will be surrounded by considerable uncertainty.

The preceding chapter was devoted to an examination of excess condemnation as it has actually been applied for purposes of recoupment, and the present chapter has discussed somewhat critically the factors in such an enterprise which make for gain or loss. It is appropriate, therefore, to venture certain conclusions as to the desirability of adopting the policy of excess condemnation in American cities as a method of financing public improvements.

The first conclusion is that the risk of loss in an excess condemnation project is too serious to warrant its adoption as a method of municipal finance. If a city has no motive for condemning surplus land other than the wish to intercept the increment of value which it hopes, by the construction of a public work, to create in that land, it would do better to secure that accretion in value

by less heroic and more reliable methods. It is probable that a system of increment taxes could be developed, whereby the purely financial advantages ascribed to a system of excess condemnation could all be secured without subjecting the public treasury to any risk of loss. It is certainly a sound principle of public finance that a municipality should not incur a risk, however slight, for the purpose of achieving an end which may be accomplished equally well with entire safety.

A second conclusion is that the financial risks incident to excess condemnation are not so dangerous as to render unwise the use of that policy for the purpose of controlling remnants of land or protecting public improvements. It has been seen that excess condemnation is the only way in which those purposes can be efficiently and adequately achieved, and it is tremendously important that they be so achieved. The cost of accomplishing those results ceases to be the primary consideration. Mr. Lawson Purdy, President of the Board of Commissioners of Taxes and Assessments of the city of New York, hardly overstates the case when he declares, in discussing the appalling chaos of land remnants skirting one of the newly improved streets of lower Manhattan, "The city of New York could have afforded to condemn a liberal zone of land on either side of that street and give it away rather than have the street left in this condition." If, by excess condemnation, a city can prevent the adequate development of a new or improved street from being arrested in this manner, or if it can protect the beauty and usefulness of a public park or boulevard, it need not seriously complain if, in the process, it loses money instead of making a profit. A city need not shrink from assuming any or all of the risks shown to be incident to excess condemnation when by so doing it ac-

complishes results so necessary and beneficial to its own wisest development. And it should be noted in passing that, in recent years at least, cities have employed this policy but rarely in cases where the protection of public improvements in some manner was not involved.

The final conclusion regarding excess condemnation as a means of financing public improvements is that no one policy aimed to serve that end need be used by a municipality to the exclusion of all others. In those cases last mentioned, where the use of excess condemnation is felt to be legitimate, a city may very frequently find that a judicious combination of that system with some scheme of special assessments or increment taxes upon neighboring property which is benefited but not condemned, will afford the best solution of the problem of how to construct such an improvement at the least cost to the public.

Such a combination of methods would be more equitable to the property owners concerned than the use of excess condemnation alone, because under it the city would appropriate the accretion in the value, not only of the land it actually condemned, but also of that which it did not take but which was measurably benefited. There would be also the added advantage of increasing the money return to the city by reason of widening the zone from which it collects this increment of value, thereby either swelling the profits of excess condemnation or mitigating its losses. If it is unsafe to employ excess condemnation as an independent competitor to the special assessment or the increment tax, there is certainly no reason why in many cases it may not be used in conjunction with either or both.

CHAPTER VI

THE ADMINISTRATION OF EXCESS CONDEMNATION

AFTER it has been decided that excess condemnation is a policy which may legitimately be employed by a municipality and after the purposes for which it may wisely be used are agreed upon, there still remains the important and complex administrative problem of translating the general principle of excess condemnation into a definite working program. In what terms shall the power of the city to exercise this policy be embodied; under what restrictions shall it be employed; how shall the city actually proceed to carry out its program? These are problems of vital importance because they intimately affect the private rights of the individual citizen through the exercise on a large scale of the right of eminent domain, and at the same time involve an enormous expenditure of the city's money and extension of its credit. They are, moreover, problems of great complexity, because in a project of excess condemnation are involved more or less intricate questions of municipal esthetics, engineering and finance.

It is interesting to note that there is not as yet any general agreement as to the details of a proper working policy of excess condemnation. No state or country has a constitutional amendment or statute exactly like that of any other state or nation. Some legislative bodies have drafted excess condemnation provisions without any definite project in view, merely in order that the general

principle might be embodied into law. These enactments have been broad and general in their import. In other cases acts have been passed in order to permit the use of this policy in some particular case and in such instances the form of the provision itself has usually been determined by the concrete situation which the lawmakers had in mind. Between these two extremes there are, of course, enactments drafted in some detail for the purpose of formulating a general working policy. But nowhere does there seem to be any substantial harmony upon anything except the very broadest lines of an excess condemnation program.

Perhaps the task of dealing with the administrative problems of excess condemnation cannot be undertaken in any more satisfactory manner than by studying the wide variety of solutions for those problems which have either been adopted or proposed, here or abroad, in the constitutional provisions and statutes already embodying that power. In this way it may be possible to reach some conclusions as to the best method of putting the policy of excess condemnation into actual operation. The accompanying analytical table has been prepared to facilitate such a study.

A practical question, arising at the very outset, is whether it is necessary to embody the power of excess condemnation in a constitutional amendment, or whether it is sufficient for the legislature of the state merely to enact a statute in due form. Practice in American states has differed upon this point. Constitutional amendments conferring this power upon cities have been adopted in five states [1] and proposed in three others.[2] Nine states

[1] Ohio; New York; Massachusetts; Wisconsin; Rhode Island.

[2] Pennsylvania; New Jersey; California. The New Jersey and California proposals were defeated at the polls.

on the other hand, have at one time or another conferred the power by statute without the sanction of a constitutional amendment.[8] In a later chapter the problem of the constitutionality of excess condemnation is discussed at length, and it is unnecessary to enter upon that question here. It may be said, however, that there is an exceedingly strong presumption against the power of the legislature in any state to incorporate this policy into law without definite authorization by constitutional provision. While it is possible that a state supreme court will yet be found which will declare such a statute valid, by far the safer plan to follow, for those interested in promoting the use of excess condemnation, is to secure the adoption of an amendment to the state constitution. Many embarrassing questions will thus be settled before they even arise. It is interesting to note that most of the states recently attempting to confer this power on their cities have pursued this policy.

Another reason may be suggested for putting the power of excess condemnation into the form of a constitutional amendment. This scheme provides for a liberal extension of one of the most arbitrary powers of government, that of eminent domain. By it individual property rights are effected to a high degree. If there is a general conviction that those rights ought to be protected from the unrestrained action of the legislature, it would be possible perhaps to write into a constitutional amendment restrictions on the legislative power to enact excess condemnation laws which would constitute adequate safeguards against the abuse of that system. It is, however, quite possible that no such limitations will be found desirable.

[8] Maryland; Virginia; Wisconsin; Pennsylvania; Connecticut; New York; Oregon; Ohio; New Jersey.

CONSTITUTIONAL AMENDMENTS PROVIDING

Amendment	*Kind of improvement to which applied*	*By whom power exercised*	*Property taken in excess*
Mass., Art. X, Part 1, 1911	"Laying out, widening or relocating highways or streets."	Commonwealth, county, city or town	"More land and property than are needed for the actual construction of such highway or street: *provided however*, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street."
Ohio, Art. XVIII, Sec. 10, 1912	"A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use."	A municipality	"An excess over that actually to be occupied by the improvement."
Wisc., Art. XI, Sec. 3a, 1912	"Establishing, laying out, widening, enlarging, extending and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings."	The state or any of its cities.	"Lands for establishing, etc. . . . and reservations in and about and along and leading to any or all of the same."
New York, Art. I, Sec. 7, 1913	"Laying out, widening, extending or relocating parks, public places, highways or streets."	Cities.	"More land and property than is needed for actual construction in the laying out, etc. . . ; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such parks, public places, highways or streets."

FOR EXCESS CONDEMNATION

Property how acquired	*Disposition of surplus*	*Restrictions on future use of surplus*	*Self-executing or enabling act*
Taken in fee	"and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value."	"With or without suitable restrictions."	"The Legislature may by special acts authorize the taking of . . . the sale of the remainder."
"Appropriate or acquire."	"and may sell such surplus."	"With such restrictions as shall be appropriate to preserve the improvement made."	Self-executing
"Acquire by gift, purchase or condemnation."	"and after the establishment, layout and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements."	"With reservations concerning the future use and occupation of such real state, so as to protect such public works and improvements and their environs, and to preserve the view, appearance, light, air and usefulness of such public works."	Self-executing
Take.	"After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased."		"The legislature may authorize cities to take. . ."

CONSTITUTIONAL AMENDMENTS PROVIDING

Amendment	*Kind of improvement to which applied*	*By whom power exercised*	*Property taken in excess*
New York, Art. I, Sec. 6, Defeated 1911	"When private property shall be taken for public use" additional land may be taken. "Property thus taken shall be deemed taken for a public use."	A municipal corporation	"Additional, adjoining, and neighboring property, etc."
Wisc., Art. XI, Sec. 3b, Defeated 1914	Same as New York amendment defeated in 1911.	Same	Same
Cal., Art. XI, Sec. 20, Defeated 1914 and 1915	In connection with "any proposed improvement" and "such additional property so taken shall be deemed to be taken for public use."	The state, county, city and county, incorporated city or town	"Additional, adjoining or neighboring property within the limits thereof, in excess of that actually to be devoted to or occupied by the proposed improvement. . ."
N. J., Art. IV, Sec. IX, Defeated 1915	"laying out, widening, extending or relocating the parks, public places, highways or streets."	"State, or counties, cities, towns, boroughs or other municipalities, or any board, governing body or commission of the same."	"More land and property than is needed for actual construction in the laying out, etc. . . of parks, etc. . . ; provided, however, that the additional lands and properties so authorized to be taken, shall be no more than sufficient to form suitable building sites abutting on such parks, etc."

FOR EXCESS CONDEMNATION — *Continued*

Property how acquired	*Disposition of surplus*	*Restrictions on future use of surplus*	*Self-executing or enabling act*
Take			
Same			
"Take and appropriate under the power of eminent domain." Must be a fee simple estate	"And such additional property may be sold, leased or otherwise disposed of, in whole or in part. . . ."	"Under such terms and restrictions as may be appropriate to preserve or further the improvement made or proposed to be made."	"The conditions under which such additional property may be taken or appropriated, the manner and method of providing payment therefor, and the terms and restrictions under which such property may be sold, leased or otherwise disposed of, shall be prescribed by general law."
Take	"And after so much of the land or property taken has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased."	"and reasonable restrictions imposed."	"The Legislature may authorize."

CONSTITUTIONAL AMENDMENTS PROVIDING

Amendment	*Kind of improvement to which applied*	*By whom power exercised*	*Property taken in excess*
Mass., Art. X, Part I, Proposed 1914, to be submitted to next General Court No action since	"Establishing parks, public reservations, wharves and docks."	Commonwealth, county, town or city, or by commission authorized by special act	"More land than is needed for the actual construction of such parks, reservations, wharves or docks, provided the land and property authorized so to be taken are specified in the act."
R. I., Art. XVII, Adopted 1916	"Establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways."	State or any cities or towns	"More land and property than is needed for actual construction, etc. . . ; provided, however, the additional land . . . be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, etc. . . ."
Penn., Art. IX, Sec. 16, Proposed 1915, Must pass in next legislature	"May, in furtherance of its plans for the acquisition and public use of such property or rights. . ."	State or any municipality	"An excess of property over that actually to be occupied or used for public use."

FOR EXCESS CONDEMNATION — *Continued*

Property how acquired	*Disposition of surplus*	*Restrictions on future use of surplus*	*Self-executing or enabling act*
Take	"after so much of the land or property has been appropriated for such parks, etc . . . as is needed therefor, the commonwealth, county, etc., . . . may hold, lease, sell or use . . . the remainder."	"With or without restrictions."	"General Court may by special act authorize."
Acquire or take in fee	After property necessary for improvement has been used "remainder may be sold or leased for value . . . and in case of such sale or lease the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same."	"With or without suitable restrictions."	"The General Assembly may authorize."
Appropriate	"may thereafter sell or lease such excess."	"and impose on the property so sold or leased, any restrictions appropriate to preserve or enhance the benefit to the public of the property actually occupied or used."	"And, subject to such restrictions as the legislature may from time to time impose, appropriate, etc. . ."

STATUTES PROVIDING FOR

Statute	*Kind of improvement to which applied*	*By whom power exercised*	*Plan drafted by*
N. J., 1870, Ch. 117	Replotting of narrow, short and irregular streets	City of Newark Commissioners appointed by city council	Aforesaid commission
Ohio, 1904, Ann. Stat. Ch. 2, p. 755	"Establishing esplanades, boulevards, parkways, park grounds and public reservations in, around and leading to public buildings."	All municipal corporations	
Va., 1906, Ch. 194	"Adjoining its parks, plats on which its monuments are located, or other property used for public purposes."	Any city or town	
Conn., 1907, No. 61	"Establishing esplanades, boulevards, parkways, parks grounds, streets, highways, squares, sites for public buildings and reservations" near them	City of Hartford. "acting through planning commission or otherwise"	Questions regarding location of public buildings, esplanades, etc., referred to commission for consideration before final action by Council
Pa., 1907, No. 315	"Making, enlarging, extending, and maintaining public parks, parkways and playgrounds . . . in order to protect the same." Taking declared to be for public use	Cities	"Council shall by ordinance or joint resolution determine thereon."

EXCESS CONDEMNATION

Plan approved by	*Plan carried out by*	*Property taken in excess*
	Aforesaid commission	"All or any part of the lands, real estate, buildings and improvements within the limits described as follows":
		"real estate within their corporate limits"
		"property adjoining its parks, etc., or other property used for public purposes or in the vicinity of such parks, etc., or property" used so as to "impair the beauty, usefulness or efficiency of such parks" and "Property adjacent to any street the topography of which, . . . impairs the convenient use of such street or renders impracticable without extraordinary expense, the improvement of the same."
Council	Council may delegate to commission powers not expressly given to other bodies necessary to completion of work	"Real estate within its corporate limits for establishing, etc., and may convey any real estate thus acquired and not necessary for such improvements."
Council	Council	Property within 200 feet of the boundary lines of the enumerated improvements in order to protect them, provided the council shall declare the control of such property reasonably necessary for such protection

STATUTES PROVIDING FOR

Statute	*Property how acquired*	*Disposition of surplus*
N. J., 1870, Ch. 117	Purchase or condemn, acquire title to and possession of	"lay out and divide the said lands and premises . . . into suitable lots and plots and shall advertise and sell the same."
Ohio, 1904, Ann. Stat. Ch. 2, p. 755	Appropriate, enter upon and hold	Resale.
Va., 1906, Ch. 194	"Acquire by purchase, gift or condemnation."	"Dispose of property so acquired."
Conn., 1907, No. 61	"Appropriate, enter upon and hold in fee."	"may convey any such real estate"
Pa., 1907, No. 315	Purchase, acquire, enter upon, take, use and appropriate	Resell.

EXCESS CONDEMNATION — *Continued*

Restrictions on future use of surplus	*Methods of reselling*	*Disposition of proceeds of resale*
	"Advertise and sell the same at public or private sale for the best prices and upon the best terms they can obtain for the same, which sale or sales may be adjourned from time to time at their discretion."	"All of the purchase moneys and securities shall be in the name and behalf of the mayor, etc., shall be paid into the sinking fund." If the proceeds are enough to make a surplus, this surplus is to be distributed *pro rata* among the owners of property taken.
"With such reservations in the deeds of resale as to future use of said lands so as to protect public buildings and their environs, and to preserve the view, appearance, light, air, usefulness of public grounds occupied by public buildings, etc."		
"Making limitations as to the use thereof, which will protect the beauty, usefulness, efficiency, or convenience of such parks, etc."		
"With or without reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works."		
"With such restrictions in the deeds of resale in regard to the use thereof, as will fully insure the protection of such public parks, etc., their environs, the preservation of the view, appearance, light, air, health and usefulness thereof"		"Provided, however, that the proceeds arising from the resale of any such property so taken shall be deposited in the treasury of said cities, and be subject to general appropriation by the councils of said city."

STATUTES PROVIDING FOR

Statute	*Kind of improvement to which applied*	*By whom power exercised*	*Plan drafted by*
Md., 1908, Ch. 166	" esplanades, boulevards, parkways, playgrounds or public reservations " In order to better protect or enhance the usefulness	City of Baltimore	Mayor and Council
Wisc., 1909, Ch. 162	Establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings and areas near by. These uses declared public	Cities of 1st, 2nd, 3rd classes. Acting through planning commission or otherwise	All public improvement projects must be referred to planning commission for consideration before final action by Council
Wisc., 1909, Ch. 165	Making, enlarging, extending, protecting and maintaining public parks, parkways, civic centres and playgrounds, and to protect them. These uses declared public.	Cities and counties having a population of 250,000 and upwards	Council or county board shall by ordinance or resolution determine thereon

EXCESS CONDEMNATION—*Continued*

Plan carried out by	*Plan approved by*	*Property taken in excess*
Mayor and Council	Mayor and Council	"any and all land and property or interest in land and property, adjoining and extending such distance as may be adjudged necessary, from any property in use or about to be acquired for such esplanade, etc., the use of which said adjacent property it may be deemed necessary or beneficial to subject to lawful restrictions or control in order to protect, etc. . ."
Council	Council may give commission power to carry out plan when that does not interfere with power of any other body	"any lands within its corporate limits for establishing, etc. . . ."
Council	Council	"neighborhood private property for the purposes herein specified."

STATUTES PROVIDING FOR

Statute	*Property how acquired*	*Disposition of the surplus*
Md., 1908, Ch. 166	Purchase or condemnation	Resale of such adjacent land or property
Wisc., 1909, Ch. 162	Gift, purchase or condemnation	"may convey any such real estate thus acquired and not necessary for such improvements."
Wisc., 1909, Ch. 165	Purchase, acquire, enter upon, take, use and appropriate	"and after the improvement is made to resell such neighboring property."

EXCESS CONDEMNATION — *Continued*

Restrictions on future use of surplus	*Methods of reselling*	*Disposition of proceeds of resale*
"such reservations and restrictions as to the subsequent use thereof, as may appear advisable for the protection of such public building or buildings, or for enhancing the usefulness thereof, or in any manner to promote the interests of the public therein, or for better insuring the protection or usefulness of such esplanades, etc., or in any manner to better accomplish the purposes and serve the public interests for which they shall have been or shall be established."		
"with reservations concerning the future use of such real estate, so as to protect such public works and improvements, and their environs and to preserve the view, appearance, light, air and usefulness of such public works and to protect the public health and welfare."		
"with restrictions as to the building thereon and use thereof so as to carefully preserve the same for the purposes intended." . . . "and may include in addition to the protection herein specified the preservation of the view, appearance, light, air or usefulness in general of said premises for public purposes." Contracts containing such restrictions shall be binding on owner of property and his grantees		Proceeds to be subject to general appropriation

STATUTES PROVIDING FOR

Statute	*Kind of improvement to which applied*	*By whom power exercised*	*Plan drafted by*
Wisc., 1911, Ch. 486	Converting streets and highways designated by council into parkways or boulevards	Any city in state	Board of public land commissioners, to recommend
N. Y., 1911, Ch. 776	Water-front facilities, terminal facilities, ways and stations	City of New York, Board of Estimate and Apportionment	
Mass., 1912, Ch. 186	"widening Belmont Street."	City of Worcester	
Mass., 1913, Ch. 201	Laying out and constructing a proposed street	City of Worcester	Plan made by city engineer must be on file
Mass., 1913, Ch. 326	Laying out, widening and relocating Washington Square and streets nearby.	City of Worcester	
Mass., 1913, Ch. 703	Widening Bridge Street	City of Salem	
Mass., 1913, Ch. 778	Laying out of Humphrey Street, in town of Swampscott	Massachusetts Highway Commission	Plan made by Massachusetts Highway Commission
Ore., 1913, Ch. 269	Public squares, parks and playgrounds. Takings for these uses declared public	Any municipality of 10,000 or more	Municipal authorities to specify by ordinance land to be taken and restrictions imposed

EXCESS CONDEMNATION — *Continued*

Plan approved by	*Plan carried out by*	*Property taken in excess*
Council by resolution	Council fixes price or condemns land. Land commissioners may then carry out plan	Land within 300 feet on either side of and abutting on any street or highway
		Such additional and adjacent area as the board of estimate and apportionment deem it necessary to replot, regrade or otherwise adapt for convenient access to and use of such ways and stations or other improvements of the waterfronts, etc.
		"a strip of land not exceeding 160 feet in depth on the southerly side of Belmont Street.'
		"the whole or parts of lots of land not exceeding 150 feet in depth on both sides" of the street
		Certain lands definitely bounded in the act.
		Strips of land definitely described in the act and not more than 125 feet in depth
County commissioners of Essex County and Selectmen of town of Swampscott	County commissioners of Essex County	Any or all property between certain specified points and not exceeding 200 feet in depth from boundary line of proposed highway.
		Land and property in excess of what is needed for the improvements specified "which land shall not embrace more than 200 feet beyond the boundary line of the property to be used for such purposes." Council to declare by ordinance that control of such adjacent property is necessary to protect the improvement

STATUTES PROVIDING FOR

Statute	*Property how acquired*	*Disposition of the surplus*
Wisc., 1911, Ch. 486	Gift, purchase, condemnation	"manage, control, govern, improve, subdivide, re-subdivide, and plot, and subject to the prior approval of the common council of such city, to mortgage and sell any such land or any parcels thereof."
N. Y., 1911, Ch. 776	Acquire	"After the same shall have been replotted, regraded or otherwise adapted for such access, use or improvement may be disposed of by the city."
Mass., 1912, Ch. 186	Take in fee	After using what is necessary for widening the street, the city may sell the remainder for value.
Mass., 1913, Ch. 201	Take in fee	Street commissioner to sell and convey by deeds the remainder of land for such value and consideration as is approved by the mayor
Mass., 1913, Ch. 326	Take in fee	Sell the part not needed for value
Mass., 1913, Ch. 703	Take in fee	Sell the remainder for value
Mass., 1913, Ch. 778	Purchase or take in fee.	Sell any land not needed for the improvement
Ore., 1913, Ch. 269	Acquire, purchase, take, use, enter upon and appropriate	Municipal authorities may authorize the sale of property not needed

EXCESS CONDEMNATION — *Continued*

Restrictions on future use of surplus	*Methods of reselling*	*Disposition of proceeds of resale*
"such restrictions and reservations as may be deemed necessary in order to convert such street or highway into a parkway or boulevard, and to protect the same and its environs and preserve the view, appearance, light, air, health and usefulness thereof."		
"such restrictions as said board may see fit to impose thereon to promote such access or use or to effect such improvement."		
"with or without suitable restrictions."		
"with or without suitable restrictions."		
"with or without suitable restrictions."		
"with or without suitable restrictions."		
Such restrictions in deeds of resale as will "fully insure the protection of such public squares, etc., their environs, the preservation of the view, appearance, light. air, health or usefulness thereof"	City shall receive sealed bids after advertising the sale. May reject any or all bids and re-advertise	Used to pay interest and principal of bonds issued for improvement. Surplus to be used by the park department of city

STATUTES PROVIDING FOR

Statute	*Kind of improvement to which applied*	*By whom power exercised*	*Plan drafted by*
Conn., 1913, Spec. Act. 243	Establishing esplanades, boulevards, sites for public buildings	City of New Haven	
N. Y., 1914, Ch. 300	Laying out, widening, extending or relocating parks, public places, highways or streets	City of Syracuse	Council asks city engineer for a plan of all lands to be taken
N. Y., 1915, Ch. 593	Any improvement. Excess taking declared to be for public purpose	City of New York, through Board of Estimate and Apportionment	
Montreal Charter, 1913, No. 421	" Any municipal purpose whatsoever."	City of Montreal, through council acting on report of board of commissioners	
Statutes of Ontario Ch. 119, No. 12, 1911	Opening, widening, extending and straightening street, laying out and establishing parks or playgrounds	City of Toronto	

MODEL STATUTES PROVIDING

Statute	*Kind of improvement to which applied*	*By whom power exercised*	*Plan drafted by*
Ottawa, 1914[1]	"any street, public park, playground, or other open space."	Local town planning boards	Local board initiates plan or takes suggestion of central board of Province
National Municipal League, 1915[2]	"local public improvements."	Cities	

[1] From First Draft of a Town Planning Act. Prepared by a committee of the Commission of Conservation, Ottawa.
[2] From the "Model Charter" of the League, tentative draft.

EXCESS CONDEMNATION—*Continued*

Plan approved by	*Plan carried out by*	*Property taken in excess*
		Real property and any interest therein
Council by ordinance	Commissioner of public works	More property than is actually needed for the construction of the improvements specified, provided the surplus shall be no more than enough to form suitable building sites abutting on such improvements
		More real property than is needed for the improvement provided the surplus is not more than is needed for the formation of suitable building sites abutting on the improvement
		"more than the immovables or parts of immoveables required for the object in view."
		Any land within 200 feet of such street, park or playground

FOR EXCESS CONDEMNATION

Plan carried out by	*Plan approved by*	*Property taken in excess*
Local board and central board of Province.		"neighboring private property within 200 feet of the boundary lines or proposed boundary lines of any street, etc."
		"an excess over that needed for any such improvement."

STATUTES PROVIDING FOR

Statute	*Property how acquired*	*Disposition of the surplus*
Conn., 1913, Spec. Act. 243	Buy and hold	"may convey and give good title to any property thus acquired and not needed for the improvement."
N. Y., 1914, Ch. 300	Take Elaborate provisions regarding condemnation	After such land as is necessary for the improvement . . . the remainder may be sold or leased by the city
N. Y., 1915, Ch. 593	Acquire Elaborate provisions as to when title may vest in property condemned	"may be either held and used by the city, or sold or leased by it in the manner provided by the Charter of Greater New York."
Montreal Charter, 1913, No. 421	Purchase by mutual agreements or expropriate	Resell
Statutes of Ontario, Ch. 119, No. 12, 1911	"By purchase or without the consent of the owners"	"The Corporation shall sell and dispose of so much of the said lands as are not required for such work within seven years or within such further time as may be fixed by the Lieutenant-Governor in Council."

MODEL STATUTES PROVIDING

Statute	*Property how acquired*	*Disposition of the surplus*
Ottawa, 1914 [1]	Acquire, enter upon take, use, and appropriate	"and shall resell the same as may be directed by the central board."
National Municipal League, 1915 [2]	Acquire by condemnation or otherwise.	Sell or lease the excess property.

[1] From First Draft of a Town Planning Act. Prepared by a committee of the Commission of Conservation, Ottawa.

[2] From the "Model Charter" of the League, tentative draft.

EXCESS CONDEMNATION — *Continued*

Restrictions on future use of surplus	*Methods of reselling*	*Disposition of proceeds of resale*
"with or without reservations concerning the future use and occupation of such real estate."		
		All money from resale or lease to be used to retire bonds to meet cost of acquiring additional property
"Such restrictions, . . . as to the location of buildings with reference to the real property acquired for the improvement, or the height of buildings or structures, or the character of construction and architecture thereof, or such other covenants, conditions or restrictions as it may deem proper."		Proceeds to be used exclusively to defray the cost of such improvements
		Proceeds to go wholly or partly to pay for the excess land or the cost of the improvement

FOR EXCESS CONDEMNATION — *Continued*

Restrictions on future use of surplus	*Methods of reselling*	*Disposition of proceeds of resale*
		Proceeds to be used by local board for town planning purposes approved by central board
"restrictions in order to protect and preserve the improvement."		

If there is to be a constitutional provision, then, embodying the principle of excess condemnation what ought to be the character of that provision? This is a question of no small delicacy. The ideal constitutional clause bearing upon this, as upon other subjects, will steer a middle course between those provisions on the one hand, which are too vaguely general to enunciate a clear and definite policy, and those voluminous clauses on the other hand, which specify with the precision of a statute even the most minute details.

Perhaps the first question to face in determining the character of a constitutional provision for excess condemnation is whether that provision should be self-executing. Thus far there have been but two constitutional amendments proposed or adopted which do not require legislative action to put them into force.[4] There is a manifest disadvantage, of course, in conferring a general grant of power upon the cities of a commonwealth, and then obliging those cities to wait helplessly until the legislature of the state chooses to act in such a way as to make that grant of power effective. There are instances in which the legislative assembly has refused to give heed to such a mandate or has given heed only after long delay. It is no part of the province of this study to offer a solution for such a problem. It is believed, however, that the power of condemning land in excess should be given to cities only in terms and under restrictions too detailed and too flexible to render appropriate their incorporation into the organic law of the state. The grant of power contained in the constitution and couched in general terms should be amplified and rendered specific in statutes passed by the general assembly. The people of the state are surely not without a remedy if the legisla-

[4] Wisconsin; Ohio.

ture declines to give effect to their expressed wishes.

If the power of excess condemnation is to be embodied in a constitutional provision which is not self-executing, ought the statutes necessary to give it effect be general or special statutes? The Massachusetts clause calls for the passing of special statutes; amendments proposed and defeated in California, Wisconsin and New York required such enactments to be general in character; while the other constitutional provisions leave the matter open except in so far as the power to pass special laws may be limited by other sections of the state constitution.

If the system of private bill legislation were developed in this country under conditions similar to those which prevail in England, perhaps a vigorous argument could be advanced in favor of conferring the power of excess condemnation by special statute. As a rule, however, there is little to be gained from such a plan in the average American state. If a city itself cannot be trusted to apply, efficiently and honestly, such a general municipal policy as that under discussion, it is doubtful if matters will be materially helped by handing over to the legislature the task of working out the details for every proposed project. Experience has certainly shown repeatedly that to send the cities of a state to the doors of the legislature, seeking an authorization to act in each case when municipal action seems advisable, is demoralizing both to the legislature and to the city. The policy of excess condemnation should be worked out by the legislature in general statutory provisions which should be applicable alike to all cities or to all cities in the same general class. The legislature should not be permitted to deal with this highly complex problem by the passing of special statutes.

The question also arises upon what governmental units a state constitutional provision should confer the power of excess condemnation. Most clauses which have been proposed or adopted have been content to grant the privilege only to municipalities. In several instances the power is granted to the state, counties, towns and cities. The broadest provision upon this point, however, is that of the New Jersey amendment defeated in 1915, in which the authority to condemn land in excess was given to the "state or counties, cities, towns, boroughs or other municipalities, or any board, governing body or commission of the same." It is doubtless true that municipalities will make the most frequent and extensive use of this policy, but there seems to be no clear reason why the other governmental authorities mentioned should not be equally empowered to employ it should an appropriate occasion arise. A constitutional provision for excess condemnation should not neglect to confer that power upon all these public authorities.

There is some disagreement in the existing constitutional provisions as to what are the purposes for which a city should be allowed to exercise the power of excess condemnation. It has already been indicated in the earlier chapters of this study that this policy has been urged as a means of securing an adequate replotting of land, as a method of protecting the beauty or usefulness of a public improvement and for the purpose of making a money profit. After an elaborate discussion of the way in which excess condemnation as applied to these three purposes has actually worked out, the conclusion was advanced that the financial risks of the scheme were too serious to warrant its use for purely financial ends. Without reopening the discussion on that point, it is here suggested that a constitutional provision embodying the

power of excess condemnation ought to stipulate that that policy should be used only for the furtherance of the first two purposes mentioned, namely the securing of adequate building sites abutting an improvement, and the providing of adequate protection to the beauty and usefulness of a public improvement.

The constitutional clauses dealing with this problem show considerable divergence upon another point, namely, the kinds of undertakings in connection with which it is permissible to use excess condemnation. There are two classes of provisions so far as this matter is concerned. There are, in the first place, several amendments which enumerate in considerable detail the kinds of projects in connection with which the public authorities may condemn land in excess. The best example of this type of enactment is the clause in the constitution of Wisconsin providing that the power of excess condemnation may be employed "for establishing, laying out, widening, enlarging, extending and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds and sites for public buildings." The principal objection to a detailed enumeration of this sort is that it must be construed as excluding everything not definitely contained in it, and a municipality may not always be able to foresee every kind of public improvement in connection with which it may wish to use excess condemnation. Thus the constitutional amendment adopted in Massachusetts, in 1911, provided for the exercise of this policy "for the purpose of laying out, widening or relocating highways or streets." It soon became apparent that so rigid a limitation on the purposes for which land might be condemned in excess was quite unwarranted, and an additional amendment has been proposed by one General Court, extending the use of the

scheme to projects for the "establishing of parks, public reservations, wharves and docks."[5] In order to avoid such inconvenience as this, several states have framed constitutional provisions for excess condemnation of a different class, clauses in which the public authorities are given the right to employ that policy in any project of public improvement.[6] It is felt that these general clauses are preferable to those containing the detailed enumerations described. It is hard to see why excess condemnation cannot be applied as appropriately in connection with the building of a bridge or wharf as in connection with the opening of a park or the widening of a street. The success and justice with which the system operates do not depend upon the precise kind of public work which is being created. The power of excess condemnation should be applicable to any public improvement.

There is another question regarding the kind of a constitutional provision in which the power of excess condemnation should be embodied upon which there seems to be no substantial agreement. This is the question of what limitations, if any, ought to be placed upon the amount of property which a public authority may condemn in excess of actual needs. The two answers which have been made to this question are first, that the surplus property thus taken shall be no more than is sufficient to form suitable building sites abutting on the improvement;[7] and second, that no limitation in regard to the

[5] Since this proposed amendment was not approved by the next General Court elected, it was never submitted to the people for ratification.

[6] New York (1911); Ohio (1912); Wisconsin (1914); California (1914-15); Pennsylvania (1915).

[7] New York; Rhode Island; New Jersey (defeated); Massachusetts (1911).

matter shall be laid down in the constitution.[8] Assuming for the sake of argument that a restriction of some kind ought to be placed upon the amount of land condemned in excess, there is still, as will be seen later on, considerable difference of opinion as to just what that limitation should be.[9] Whether that excess taking should be limited to an amount suitable for building sites, or should be limited to a depth of a definite number of feet, is a problem which can best be solved by actual experience. Rather than incorporate an *a priori* solution to that problem into a constitutional provision it would seem, on the whole, wiser to leave the matter open and allow the legislature to impose such restrictions as may, in the light of actual experience, seem to be wise.

It has been suggested above,[10] that state legislatures have in some cases felt free to confer upon municipalities the right to impose reasonable restrictions upon the future use of the surplus property which it resells, even when the constitution of the state is silent upon that point. It may very well be, therefore, that it is quite unnecessary to have any pronouncement in the constitution in regard to the matter. There is nothing to be lost, however, and much may be gained in precision by having it definitely stated in the constitution that public authorities may impose such reasonable restrictions upon the future use of surplus property of which they wish to dispose.

Finally, a constitutional provision defining the policy of excess condemnation should allow the legislature to provide that property condemned by a public authority in

[8] Ohio; Wisconsin (passed 1912) (defeated 1914); New York, 1911, defeated; California; Massachusetts, 1914; Pennsylvania.

[9] *Infra*, p. 257ff.

[10] *Supra*, p. 102.

excess of its needs may subsequently be disposed of by sale or lease.

In recapitulation, then, there should be a constitutional provision embodying the power of excess condemnation and that provision should be drawn along the following seven lines:

1. It should be given effect by means of general statutes enacted by the state legislature;

2. It should confer the power of excess condemnation upon the state itself, counties, municipal corporations or any board, governing body or commission of the same;

3. It should make the power available only for the securing of adequate building sites abutting an improvement and for protecting the beauty and usefulness of an improvement, and not for recoupment merely;

4. It should make such power available in connection with the construction of any kind of a public improvement;

5. It should place no definite restriction upon the amount of land which may be condemned in excess, merely providing that more land may be thus taken than is actually necessary for the improvement;

6. It should permit that surplus to be sold or leased.

7. It should make possible the imposition of reasonable restrictions upon the future use of that surplus property.

A criticism of such a constitutional provision immediately suggests itself. The important powers, thereby conferred, are couched in exceedingly general terms, and are surrounded by almost no restrictions aiming to guard against an abuse of those powers and a wanton disregard of the rights of the individual property owner. It is believed, however, that the omission of such restrictions is

justifiable. Excess condemnation in the United States is still in the experimental stage. Most of the problems connected with it can be solved wisely and finally only through actual experience. Owing to some of the unavoidable speculative features of the policy, it is important that those charged with carrying it into effect be given as high a degree of discretionary power as is possible. It is true that discretionary power carries with it a danger of abuse; but it is also true that a policy like excess condemnation, when robbed of its flexibility, may prove not only futile but also positively harmful. It is submitted, therefore, that the hands of the legislature should be tied as little as possible in their task of giving effect to the constitutional grant of the power of excess condemnation. As the practical problems connected with the working of that system are met and solved, experience may indicate the wisdom of incorporating in the constitutional grant additional limitations upon the power therein conferred.

After the power of excess condemnation has been embodied in a provision of the state constitution, there still remains to be decided the character and provisions of the general statute to be enacted by the legislature under authority of that provision. The problems arising in this connection are much more numerous and complex than those already considered.

One of the first questions that arises in the process of drafting such a statute is the question: what particular part of the machinery of local government shall carry out the policy of excess condemnation? Who is to work out the plans to be followed in an excess condemnation undertaking; what authority should approve those plans; by what agency should they be carried out? Is it necessary or advisable that any or all of these duties be

turned over to a specially constituted organ of government, or should they all be added to the duties of already existing administrative agencies?

Taking up these questions in order, to whom should be committed the task of drafting the plan for a project of excess condemnation? It will hardly be denied that a venture of this sort should not be entered upon without a plan. The adequate protection of the rights of the individual citizen, the welfare of the public as well as sound business principles, all demand that before the city embarks upon a project of excess condemnation it should have, not a vague and general idea of what it purposes to do and how it purposes to do it, but a concrete, definite, detailed, black-and-white statement which may be examined, criticized and if need be modified. Two main policies have been followed in the various states and cities to provide for the creation of such a plan. In the first of these, the whole power of excess condemnation from beginning to end is turned over to the control of the municipal council.[11] It is doubtless contemplated that under such an arrangement a committee of the council would work out a plan which would be submitted for approval to the whole body. This is what would happen, for example, if the Board of Estimate and Apportionment of the city of New York were to exercise its power of excess condemnation. In certain cases, provisions of this first kind are made more definite by the

[11] Pennsylvania (1907); Maryland (1908); Wisconsin (1909); New York (1911, 1914, 1915); Oregon 1913. In Virginia (1906); Massachusetts (1912: Ch. 186, 1913: Chs. 201, 326, 703); Toronto (1911), nothing is said in regard to this matter. Apparently the intention was to leave it in the hands of the council. The Ohio amendment confers the power of excess condemnation upon all cities, both home rule and others. The home rule cities could work out these administrative problems in their charters while other cities would solve such problems through the city council.

requirement that a definite plan prepared by the city engineer must be on file before the city proceeds with its undertaking.[12] In these instances, however, there is no intimation that the city engineer shall have any discretionary power which will enable him to determine the character of the plan which he draws up. He performs in this connection a purely ministerial function. This first method of drafting a plan for an excess condemnation project proceeds upon the assumption that that task can be adequately and effectively performed by men possessing no special experience or unusual ability. It is merely a legislative policy calling for the same kind of consideration which is given to the general run of more or less technical ordinances.

A second scheme for the working out of such a plan has been adopted in some states and cities. This scheme rests upon the assumption that the task of outlining a plan for the guidance of the city in its exercise of the power of excess condemnation is one that calls for skill and experience which is attainable only in a specially constituted board or commission. Consequently one finds this important duty imposed upon such organizations as a city planning commission or a board of public land commissioners.[13] This does not mean that the powers given to these boards are either final or exclusive. In some cases their advice must be sought in the matter of drawing up the plans for the use of excess condemnation but need not be followed. In other cases their approval of those plans is necessary to put them into force. They may not have the positive power of determining the details of the plan itself, but they can at least exert a

[12] Massachusetts (1913: Ch. 201); New York (1914).

[13] New Jersey (1870); Connecticut (1907); Wisconsin (1909, 1911); Montreal (1913); Ottawa (tentative law, 1914).

strong pressure in the matter of controlling its character by placing their veto upon things that are objectionable, or voicing their protest against them.

Whether one is inclined to favor the one or the other of these two schemes will depend largely upon his conception of the character of the function of drawing up the kind of plans necessary in these cases. If the task is one which calls merely for good common sense and sound business judgment, there is no compelling reason why the city council or one of its committees should not, with the assistance of the city engineer, perform that task. If, however, this kind of work requires something in the way of technical knowledge and experience which the average man does not have, then the city should be willing to call in the services of men who are thus trained and are familiar with the problems which need to be solved.

There is no gainsaying the fact that American cities have sometimes suffered seriously from an overdose of expert advice, and have occasionally relied for guidance upon men whose narrow specialization has blinded them to the broader needs of the community. This has happened occasionally with the problems of city planning and general municipal improvement. It would certainly be a plan of doubtful wisdom to turn over the problem of working out a scheme involving the use of excess condemnation to a man or group of men who were merely interested in the esthetic gains which might accrue from such an undertaking. But this it is unnecessary to do. It is possible and, it is believed, desirable, to organize a group of men to perform this important service who have the sort of training and experience necessary for the task, and at the same time have a high degree of practical business sense and imagination enough to plan wisely for the future needs of the city. Many cities

have created city-planning commissions of this type, and the suggestion is made that to this sort of body should be given the work of making the plans for projects of excess condemnation.

It is not desirable to make this sort of commission the only source from which any suggestion for the use of excess condemnation should emanate; but it should be given the right to initiate such plans and present them to an appropriate political authority for approval. On the other hand it should be made impossible for the municipal council to adopt any scheme involving the policy of condemning land in excess without previously securing the approval of this body. In practice it would probably become an agency which would work out plans for such undertakings at the request of the council.. In short it would have a general veto power which it could exercise to control the character of such schemes for public improvement.

While the character, composition and organization of such a planning commission need not be discussed in great detail, its general features may be roughly mapped out.

It should, in the first place, be a body in which all of the viewpoints necessary to the drafting of a wise and practical plan for public improvement should be represented. Precisely what persons or officials this might include need not be finally settled here; but it would be proper to make the mayor, the city engineer and perhaps one of the financial authorities of the city *ex officio* members. In addition there should be persons familiar with city-planning problems and the intricacies of real estate transactions.

It is, of course, unnecessary to say that every effort should be made to make this commission non-partisan

and non-political. By a system of long terms and partial renewal for those who are not *ex officio* members, a certain permanence and weight of experience will be acquired which will be of the utmost value. It is possible that a permanent city-planning advisor might be attached to such a body after the fashion of the city-planning advisor of the Commission of Conservation in Canada. It is submitted that such a group of men would be able, by reason of their experience, training and insight, to suggest the way in which the important power of excess condemnation may be employed most wisely and to draft the necessary plan.

While it is thus desirable to have the plans for projects involving the use of excess condemnation drawn up by a special body adapted to such a task, it is not necessary to create any new municipal organization for the approval of such plans. Obviously, the special commission above described should not be given the power to effectuate their plans without such approval. When the execution of a policy calls for the exercise of the power of eminent domain, the outlay of large sums of money and the imposition of taxes or special assessment charges, it must receive its final sanction from the policy determining authorities of the city. Any proposal for the application of the excess condemnation principle should ultimately be embodied in a municipal ordinance. It is perfectly true that city councils have sometimes been guilty of gross corruption and neglect of the public welfare in adopting measures for the construction of public improvements. When, however, the plans for such projects are worked out or scrutinized by an independent and expert commission, the legislative department of the city will have small incentive to, or opportunity for, dishonest practices. Under such a system the city council

may be safely and wisely intrusted with the final approval of such plans.

It might be mentioned, in passing, that there need be no system of popular approval for the plans of such projects. Adequate provision should be made by law to permit persons whose interests are affected to appear before the planning commission or the city council or both and there present their claims. Nothing more seems necessary to the adequate protection of private rights. To make the validity of the plan contingent upon any sort of popular referendum, save of course the approval that might be necessary for a bond issue, would be to burden the electorate with the solution of a highly detailed and somewhat technical problem in respect to which their opinion would probably not be of great value.

It is worth noting that in the countries of Europe, and even in Canada, cities are subjected to control by the central administrative authorities in matters relating to the planning of public improvements. Every exercise of the power of condemning remnants of land in the city of Paris must be sanctioned by the Council of State.[14] In England the power of condemning land in excess is granted in most cases only by special act of Parliament, a process involving usually a hearing more or less judicial in character before a parliamentary committee. Should this power be used in connection with the authority conferred by the Town Planning Act of 1909, the scheme of the projected undertaking would have to be approved by the local government board. In Germany, any exercise of the power of replotting land (*Umlegung*) is subject to the approval of the Minister of the Interior. Without entering upon an extended discussion of this question, it may be said that all of these

[14] *Supra*, p. 54ff.

requirements for the approval by the central administrative authorities of excess condemnation projects, as well as other undertakings for public improvements in cities, are not an innovation. They are merely a natural part of a system under which the central authorities exercise an administrative control over municipalities in a large number of matters. With that type of central control American municipalities are unfamiliar. Seeking, as they are, emancipation from the domination of the state legislature, it is unlikely that they would look with favor upon this European type of regulation by the state. And the exercise of that supervision would necessitate the creation in the state government of an entirely new system of administrative machinery. If the time does come, however, when American states subject their cities to any form of general administrative control, as distinguished from the special control that is now established in many states over certain local activities, the planning of projects which involve the use of excess condemnation might well be made one of the matters to receive that central supervision. Until that time, the approval of the political authorities of the city must serve as the final sanction for such schemes.

The question whether the carrying out of a plan of excess condemnation should be intrusted to some special governmental agency is one that may readily be disposed of. The task of putting these projects into effect may be difficult and complex, but those difficulties and complexities are in the main not peculiar to excess condemnation undertakings as compared with other public improvement enterprises. If such plans are carefully and wisely drawn, there seems to be no good reason why their execution should not be committed to that municipal agency or department which ordinarily has charge of the

construction of public works. In several instances the planning commission itself is authorized to put its plan into effect,[15] but in most instances the regularly established administrative agencies are utilized to that end. It is possible that the planning commission might wisely be given some functions of supervision over the carrying out of the plans they have drawn. Experience will show which of these methods is most satisfactory and the only *a priori* conclusion ventured is that there would seem to be no obvious advantage accruing from the creation of an entirely new agency for this purpose.

After one has reached an opinion as to what municipal authorities should exercise the power of planning, approving and carrying through a scheme of excess condemnation, there remain to be considered several problems relating to the limits within which a city's power to utilize that policy ought to be confined by general statute.

In the first place, ought a city to be allowed to use excess condemnation in connection with the construction of any and every kind of public improvement? It has already been urged that a constitutional provision granting this power ought not to attempt to enumerate the kinds of projects for which it may be used. Without further discussion, it may be suggested that the same rule should apply to a statute embodying this power and for the same reasons presented above.[16] A municipality should be left free to utilize the policy for such purposes as, in its discretion, it deems wise. It is believed that as soon as excess condemnation has emerged some-

[15] In New Jersey (1870); Connecticut (1907); Wisconsin (1909, 1911) the council is authorized to give the commission this power if it does not interfere with the functioning of any regularly organized department of the city government.

[16] *Supra*, p. 243ff.

what from the experimental stage in this country, this is the kind of statute which will be enacted.

There arises next the question, how should the city acquire the land which it takes in excess of its actual needs? It will probably be admitted at the outset, by every one, that the city must in all cases acquire the fee to the property it takes. While there may be cases in which the municipality may for certain purposes wisely limit itself to the condemnation of an easement, the fact remains that it would be practically impossible for a city to carry through a project of excess condemnation were it to acquire conditional title to the surplus land. Most constitutional provisions and statutes have been content to assume that point; and where it is mentioned, one finds the stipulation that nothing less than the fee to any such property must be taken by the municipality.

The property itself would, of course, be acquired by the exercise of the right of eminent domain. It is certainly no part of the program of excess condemnation to evolve a new system of condemnation proceedings and in no case has any attempt been made to do so. Muncipalities use the same methods of condemning land in excess that they use for condemning land actually needed. It is well enough to face the fact clearly, however, that excess condemnation involves the exercise of the right of eminent domain on an unprecedentedly large scale, and for that reason any defects in the method of condemning land will be greatly magnified in these more extensive undertakings. A wasteful and haphazard system of procedure is bad enough when applied to the smallest taking of land; but when used for condemning land in excess it becomes a source of loss and injustice that cannot be tolerated. It is doubtless true that there are many cities in the United States where much time is lost

in condemning land because of long drawn out litigation, and where much money is lost both in the form of legal costs of procedure and excessive awards of compensation. A possible desire to use excess condemnation, however, should not constitute the city's only reason for reforming such a system.

It is hardly necessary to add that the city should be given the power to acquire surplus lands by gift, or purchase, or by exchanging for them land which it already owns. In none of these cases, of course, would the city be exercising the power of excess condemnation. In many places, furthermore, the city already possesses the power to acquire land in these ways. Such power may be regarded as necessarily incidental to that of condemning land in excess and might perhaps be assumed to be included in that broader power even without a specific grant in words. But it would, doubtless, be wiser to specify in a general statute that the municipality may acquire excess land by condemnation, gift, purchase, or exchange.[17]

It was suggested above that so far as the provisions of the constitution were concerned, the state legislature ought not to be limited as to the amount of excess land which it might authorize a city to condemn. By experi-

[17] No American provision for excess condemnation has thus far granted to cities the right to acquire surplus property by exchange. That power is not substantially different, however, from the power of purchase. It does, however, involve the right on the part of a city to dispose of property, a right which cities in many cases do not have. Where it does have such authority to sell, it is hard to see how a city which had determined to effect such an exchange could be prevented from doing so, although it might have to resort to the formality of sale and purchase. The principle is the same. Recent English statutes have definitely sanctioned exchanges made without the passing of money. London County Council (Improvements) Act 1899; The Mall Approach (Improvement) Act 1914. This whole question is discussed at a later point. See *Infra,* p. 265.

ment only can it be finally decided whether such a limitation is necessary or, if it is necessary, what its character should be. It is quite difficult to decide whether the state, in turn, ought to place a definite restriction in this regard upon the city. While the same argument used to justify the omission of such a limitation upon the state might be urged in behalf of the same freedom for the municipality, it is quite unlikely that any state would be willing to see its cities given absolutely free rein in such a matter. Abuse and indiscretion would be far more probable on the part of the city which actually exercised the power of excess condemnation, than on the part of the state legislature which merely authorized the exercise of that power. The state ought therefore to set some outside limit to the amount of land which its municipalities may condemn in excess. What, then, shall that limit be?

Two definite ways in which the amount of surplus land which a city may take has actually been limited in different states and municipalities have already been mentioned.[18] The difference between them is probably due to the difference in the problems which excess condemnation is expected to solve in different places. Those provisions which stipulate that the city shall take only so much excess land as is necessary to form suitable building sites abutting the improvement were doubtless framed with the idea that the power of excess condemnation would be used primarily for the purpose of replotting the land skirting an improvement so as to do away with remnants of land and make possible the adequate development of the street. This idea seems, certainly, to have been uppermost in the minds of the men who fathered the New York provision. On the other

[18] *Supra*, p. 244ff.

hand, those provisions which limit the excess land which a city may take to a zone a definite number of feet in depth,[19] seem to have been framed with two thoughts in mind: one, the adequate protection of the beauty, light, air or view of the improvement, the other, the securing to the public treasury the amount of the accretion in the value of as much land as could be expected to be measurably benefited by the construction of the public improvement. The conclusion has been reached, in an earlier chapter, that excess condemnation ought not to be employed by a public authority for the sole purpose of making money. The problem narrows itself down, therefore, to the question of framing a limitation on the amount of excess land which may be taken, liberal enough to assure the protection of beauty and usefulness of the improvement and the allotment of suitable building sites, but not so liberal as to permit abuse.

There are several objections to the policy of putting a definite numerical limit upon the number of feet of excess land which a municipality may condemn. The first objection lies in the difficulty of deciding what that numerical limit shall be. Acts have already been passed in various states setting this limit at one hundred and twenty-five,[20] one hundred and fifty,[21] one hundred and sixty,[22] two hundred,[23] and three hundred feet[24] respectively. Which one of these restrictions should be

[19] As 200 feet in the Pennsylvania act of 1907; or 300 feet in Wisconsin act of 1911, Chap. 486.

[20] Massachusetts, 1913, Ch. 703.

[21] Massachusetts, 1913, Ch. 201.

[22] Massachusetts, 1912, Ch. 186.

[23] Pennsylvania, 1907; Massachusetts, 1913, Ch. 778; Oregon, 1913; Ontario, 1911 (Toronto); Ottawa, 1914, (tentative law).

[24] Wisconsin, 1911.

incorporated into a general statute? The second objection to this type of restriction is its lack of elasticity. It may be that in most cases a city will have no occasion to condemn more than two hundred feet of land on either side of an improvement. It may not as a rule condemn as much as that. On the other hand, occasion might arise, in connection with the creation of terminal facilities or water-front development, that suitable building sites for adequate warehouses or similar structures would be much more than two hundred feet in depth. In such a case, an inelastic restriction might prevent or seriously retard the accomplishment of the city's purpose in making the improvement. In the third place, an arbitrary limit thus placed upon the amount of surplus land which may be taken might make, along the extremities of the zone, simply a new series of remnants because the city would be prevented from acquiring the whole of a plot only part of which it needed to condemn.

It may be argued, however, that if a city were never permitted to take more land in excess than is actually necessary to secure suitable building sites it would find itself unable to protect adequately the beauty and usefulness of such public improvements as parks and boulevards. In other words, neither one of these two types of restrictions, taken by itself, satisfactorily meets the whole problem.

In order to meet this difficulty, the following proposal is made for a restriction upon the amount of land which may be condemned in excess. It will be recognized as a composite of two provisions already in force.[25] Under its authority a municipality would be given the right to condemn enough surplus land: (1) to form suitable building sites abutting on any public improvement; and

[25] New York, Maryland.

(2) such adjacent land in addition as it may be deemed necessary or beneficial to subject to lawful restrictions or control, in order better to protect the beauty, light, air, view or usefulness of the improvement. Under the first part of this provision, a city would be free to take land abutting on a street for the purpose of securing adequate building plots, when it had no desire to subject that land once replotted to any form of control. The second part gives power to condemn as much land as the city would actually care to control through building restrictions. In either case, the city would be limited in the amount of land it took to what was necessary to accomplish a definite and legitimate purpose. It would be given sufficient freedom, however, adequately to accomplish that purpose.

Another important question which comes up in framing a general excess condemnation statute is: what shall be done with the surplus land which a municipality has acquired? The three possibilities in this direction are, of course, sale, lease and exchange; but there are many problems connected with each one which need to be examined somewhat carefully.

From the point of view of administration, it does not make much difference to a municipality whether it sells or leases the surplus land which it holds. It is probable that American cities would be more inclined to sell such land outright, since most of them have had little or none of the experience of European municipalities in the ownership or management of land. It might very well be, however, that a city would prefer to lease, rather than sell, certain plots of land which it felt that it might, at some future time, have occasion to devote to a public use. But such procedural requirements and restrictions as might be placed upon the municipality in the matter of

selling surplus land would apply equally to the leasing of that land.

There are three methods by which a city might be authorized to sell or lease land which it had condemned in excess. The first of these is by private contract with a purchaser without any public formality; the second is by sale, after due advertisement, to the person who sends in the highest sealed bid; and the third is by public auction.

The first of these methods is open to serious objection on three grounds. To allow the public authorities of a city to sell or lease land by private agreement without publicity and without competition, is to open the door to favoritism and corruption. Nothing is more demoralizing to efficient administration and official integrity than the uncontrolled authority to dispense favors and privileges. The facts already presented regarding the unsavory operations of the Metropolitan Board of Works of London in disposing of lands taken for purposes of recoupment [26] indicate dangers which may well result from conferring uncontrolled discretion in this matter upon the public authorities. In the second place, the private sale of surplus lands, by eliminating competition, gives the city no assurance that the price received for such lands is the best price obtainable. Finally, this method is very apt to take away from the former owner of the surplus lands any chance of buying back again his original location. He may not even be permitted to make an offer which will be seriously considered by the public authorities. A municipality should not be permitted to dispose of excess land by a method which is thus liable to abuse, and is unfair to the original owner of such land.

The two remaining methods of disposing of public property, i.e., by advertising for bids and by holding a

[26] *Supra*, p. 164.

public auction, may be discussed together. In either case the sale is conducted in a manner capable of adequate regulation against fraud and collusion, while, through the influence of competition, the price which the public receives under normal conditions will approximate the actual value of the land. Which one of the two methods should in any given case be employed is a question which may well be left to the discretion of the municipalities to be settled in the light of existing conditions. As a rule, the auction sale will probably afford the best results when the land to be sold or leased comprises numerous plots of fairly low value. It would be unprofitable to undertake to suggest, in detail, the rules and regulations which would need to be drawn up to govern such auctions and public sales. It is sufficient to indicate two important requirements that should be attached to any such program for thus disposing of lands condemned in excess.

The first of these stipulations is one which will provoke no particular dispute. It is merely a provision that if the prices offered for the surplus lands, either in the sealed bids submitted or at the public auction, are too low to justify the municipality in accepting them, the public authorities should have the power to call off the sale and advertise for new offers. Thus the city would be protected against the results of collusion among those seeking to purchase the lands at a price unreasonably low.

The second restriction placed upon the method of selling or leasing surplus lands is one already mentioned, designed to protect the interests of the former owner. It would stipulate that such an owner should be guaranteed the privilege of buying back his former property, provided he is willing to equal the best offer the city receives for that property, and provided the terms and conditions of sale are satisfactory to the city. Under such

a regulation, the city would probably carry through its projects of excess condemnation with the minimum of inconvenience to the owners of private property and without prejudicing the interests of the city.[27]

It is worth noting that the public authority, in thus favoring the former owner, does not do so at the expense of the community interest. The price paid must be as high, the restrictions as to future use must be as rigid, as though the city were selling to one who had had no previous interest in the property. In fact, it might well be expected that such a concession would enable the municipality to acquire the surplus land, in the first place, at a much better price than it could secure if the owner had no prospect of reinstatement. If he knew in advance that such an opportunity would be afforded, the loss which he sustained would be much less, and there is probability that in many cases such an owner would sell to the city without making necessary a resort to condemnation proceedings.

This proposition does not, however, escape criticism. It is urged, in the first place, that such a system would stifle competition in bidding on the property which the public authorities are trying to sell or lease. If there is this definite understanding that the original owner of a piece of land may buy it back by matching the best bid made, few will be interested in submitting bids under such conditions. Just how serious an objection this would prove to be can be shown only by experience. It is not easy to see, however, why a man who really wished to secure a piece of land would not bid, even under these conditions. The chance of having his bid equaled by the former owner of the land is no greater than the chance of having it exceeded by some other bidder. It is not

[27] *Supra*, p. 116ff.

necessary, moreover, to assume that the former owner would always desire to equal the bids made.

An administrative difficulty might be encountered in extending this option to the original owner of surplus land, by reason of the fact that there may very well be several former owners, when the plot of land offered for sale is made by the merging of several parcels. This need not be regarded however as a primary objection. Some equitable scheme could be devised whereby those who formerly owned the plots which have been combined might be given the privilege of buying the new plot in the order of the proportion of it which they originally held, or it might be sold to the one who would bid the highest.

It is unnecessary to dwell at length upon the question of allowing a municipality to dispose of surplus land by exchange. The method of exchange is a more convenient way of accomplishing the same general purpose which might be achieved by purchase and sale. It does not really involve a new principle. There are frequently reasons why it would be mutually advantageous to the city and the property owner merely to trade one plot for another. The land which the city receives in return for its surplus may be located along the lines of the same improvement upon which the city's property abuts [28] or it may be situated in an entirely different part of the city.[29] Such exchanges would, however, have to be private and there would be no assurance that the city might

[28] As in the case of the exchange of land parcels recently effected in London in connection with the Mall Approach improvement. *Supra*, p. 199ff.

[29] A few years ago the city of Philadelphia exercised the power of excess condemnation to take a triangle of land about three acres in area located at 33d and Ridge Sts. This plot, which formed a valuable building site, the city later exchanged for seventy-five acres in Roberts Hollow which it desired for park purposes.

not enter into bad bargains or that the interests of the former owner of the land taken in excess would be adequately protected. For these reasons the adoption of such a policy by American cities would probably be unwise.[80]

Another general problem to be solved, in mapping out the lines along which an excess condemnation statute should be drawn, is that of settling upon the restriction which may be imposed upon the future use of the land which the city has condemned in excess. This is a highly important matter, since, perhaps in a majority of cases, a project of excess condemnation will be undertaken for the purpose of imposing those restrictions. Their character vitally concerns the results accomplished in making the improvement, the financial outcome of the enterprise and the rights of the citizens who through the subsequent ownership of the surplus land will be subject to those restrictions.

Because these restrictions are so vital a consideration in any scheme of excess condemnation, the question whether they shall be imposed at all, or what kind shall be imposed in any given case, should be turned over to the same planning commission which works out the other details of the entire project. In other words, these restrictions should be planned and approved in precisely the same way that the other parts of the excess condemnation schemes are planned and approved. The only limitation as to their general character which should be

[80] The principal attack launched against the recent use of this policy in connection with the Mall Approach improvement in London (*supra*, p. 199ff.) was based on the ground that the public authorities attempted to give in return for the sites it needed, certain lands which were taken against the protest of their former owner. In other words, in order to reinstate one owner to his satisfaction the city actually displaced another.

written into law is the stipulation that such restrictions should be suitable for the purpose of adequately protecting the public improvement which it is their purpose to protect.

In the detailed elaboration of these restrictions, a great deal must of necessity be left to the discretion of administrative officials. After the general character of the restrictions had been settled upon, approved and made public, the question of whether or not the building plans of any individual owner conformed to those requirements could well be left to the decision of the planning commission. This control would be rendered effective by requiring the prospective builder upon restricted land to submit his plans to the commission for approval before beginning any actual construction.

A general statute embodying the power of excess condemnation would need, furthermore, to contain some provisions bearing upon matters of finance. Ought such a statute, for instance, to provide how the money necessary for the actual work of making the improvement shall be secured? This question has ordinarily been answered in the negative, and American states have been content to assume that cities would raise the necessary funds for excess condemnation projects as they would raise them for any other purpose. No peculiar problem is raised in this connection and it is doubtful if any special regulation is necessary or desirable.

The state of Ohio, however, has incorporated into its constitutional provision for excess condemnation an interesting stipulation regarding the use of the credit of a municipality for enterprises of this kind. After the usual grant of the power to condemn land in excess, the section goes on to read: "Bonds may be issued to supply the funds in whole or in part to pay for the excess

property so appropriated or otherwise acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."[31] The constitutional convention which adopted this provision seems to have accepted it largely on faith from the hands of its committee on municipal government and very little discussion was given to it.[32] Such meager discussion as did arise on this point, as well as a consideration of the clause itself, seems to indicate that two ideas lay back of its proposal. The first of these was the belief that such a regulation would tend to prevent the use of excess condemnation for speculative purposes. Since the general credit of the city is not pledged as security, either for the bonds issued for this purpose or for the interest charges on them, those bonds will be viewed as a safe investment only if the enterprise upon which the city seeks to embark is regarded by the investing public as safe and profitable. If the city attempted to enter upon an ill-advised scheme of excess condemnation, it would find itself thwarted at the outset by its inability to market the bonds necessary to finance the undertaking. The second consideration which may have actuated the proposal of this limitation is the fact that such an arrangement would make it possible for a municipality already bonded up to the limit, or nearly so, to undertake a project of excess condemnation which would otherwise be impossible because of that debt limit. Such disregard of the limit of indebtedness is, of course, held to be justified on the ground that the excess condemnation enterprise will at least pay its own way.

[31] Ohio Constitution, Art. xviii, Sec. 10.

[32] *Proceedings and Debates*, Ohio Constitutional Convention 1912, Vol. ii, pp. 1448, 1458–1459.

It will be highly interesting to see just what the real effect of this provision will be when it has been tested by actual experience in the cities of Ohio. One or two criticisms might be urged, however, against the general adoption of such a regulation. In the first place, there is a probability that the conservatism of the investing public might operate to prevent the city from entering upon excess condemnation projects which are really safe and legitimate.[38] At least there is no assurance that investors could discriminate with uniform accuracy between highly speculative and reasonably sound undertakings. Wholesome as the proposed check might prove to be against ill-advised action on the part of the city, it is, after all, the city which should finally decide whether an excess condemnation undertaking is worth embarking on and it ought not to be left helpless to proceed when it has determined to do so. This proposal to free the general treasury from any liability for excess condemnation bonds proceeds upon the false assumption, in the second place, that a municipality ought never to engage in an excess condemnation project which is not profitable financially, or which does not at least pay its own expenses. Were the city using excess condemnation for the sole purpose of making money, that assumption would be sound enough. But it is very readily conceivable that the public benefit to be derived from an adequate replotting of the land abutting an improvement or a satisfactory protection of the beauty or usefulness of the improvement itself might be so great that a city could well afford to employ excess condemnation at a substantial money loss in order to achieve those results.

[38] This has usually occurred where public utility bonds are merely secured by the utility property and not by the city's general credit.

And finally, should cases arise in which an exercise of the power of excess condemnation which seems at the outset to promise favorable financial returns results in actual loss to the city, there seems scant justice in making innocent investors in the bonds of the city bear the burden of that loss. It is the city and not the bondholder who should suffer in such a case. On the whole, it seems better to allow a city to secure the funds necessary for carrying through a project of excess condemnation in the same way in which it secures funds for any public improvement scheme.

A financial provision commonly found in statutes granting the power of excess condemnation is the stipulation that the returns derived from the disposal of the surplus land shall be applied to meet the cost of the project. The wisdom of such a requirement is too obvious to warrant discussion. It should be noted, however, that such a clause is not, in itself, quite adequate. It does not contemplate that a case will ever arise in which the returns from an application of the policy of excess condemnation will exceed the cost. In other words, no provision is made for any profit which the city might make.

This raises the question, of course, whether it is necessary to make any special provision for the disposition of such profits. In the absence of any such regulation covering that point, any surplus would automatically go into the general fund of the city. That may be an entirely satisfactory arrangement. Two suggestions present themselves, however, which would provide for a different disposition of the profits which might accrue from these projects. The first suggestion is to apply the surplus derived from excess condemnation projects to cancel the deficit resulting from such projects as fail. This could

readily be done, of course, by creating a special fund into which such money should be paid. The second proposal for the disposition of such surplus is to devote it exclusively to defray the cost of park construction and improvement. While there is, perhaps, no definite reason why such funds should be applied for one useful or necessary purpose more than another, there is, perhaps, some gain in having the use which may be made of such money fixed by general statute. This would remove any temptation that might arise to use the policy of excess condemnation in times of financial distress for the purpose of making money which would be available for general expenses. Any such abuse would doubtless be adequately prevented by providing that any profits the city might make in this way might be appropriated by the council for such projects of public improvement as are approved by the planning commission of the city.

For purposes of summary, the essential provisions of a general statute through which the power of excess condemnation should be conferred upon the local public authorities of a state may be presented in the following condensed form:

I. GOVERNMENTAL AUTHORITIES TO USE THE POWER

1. *To draft or sanction any plan for use of excess condemnation:*

A special planning commission:

Ex officio members — Mayor, city engineer, etc.; optional member — a permanent advisor

Non-partisan

Long terms

Partial renewal

Authority: to initiate plans; veto power on all plans

2. *To approve plan:*

The city council; the planning commission

3. *To carry out the plan:*

Authorities ordinarily intrusted with that work acting under general supervision of planning commission

II. REGULATIONS GUIDING EXERCISE OF POWER OF EXCESS CONDEMNATION

1. *Purposes for which it may be used*

To be applicable to any kind of public improvement

2. *Acquisition of surplus land*

a. All such property to be acquired in fee

b. Method of acquisition

Condemnation

Purchase

Gift

Exchange

c. Amount of surplus which may be taken

Enough to form suitable building sites abutting on improvement; and adjacent land, in addition, the use of which it may be deemed wise or necessary to control through the imposition of restrictions

3. *Disposition of surplus land*

a. Methods of disposition

Sale

Lease

- b. Restrictions on city in disposing of surplus land
  - Advertised bids or public auction, property may be withdrawn from sale if bids are unreasonably low.
  - Former owner to be given opportunity to buy back his land at a price equal to the best offer received by the city and upon terms and under conditions satisfactory to the city
- c. Restrictions on future use of land. Such as are suitable for the protection of the improvement.
  - General type to be formulated by planning commission and approved by council
  - Detailed compliance with these general limitations secured by requiring builders to submit plan in advance to be approved by the planning commission

4. *Financial Provisions*
   - a. No special regulation relating to issuance of bonds
   - b. Proceeds from sale of surplus to be applied to cost of making improvement
   - c. Any profits from excess condemnation to be appropriated by council for any project of public improvement sanctioned by planning commission

These suggestions lay no claim to finality. Most of them are based frankly on an *a priori* conception of the way in which they would probably work out. They are presented, however, after careful consideration of the

numerous enactments in which the power of excess condemnation has been embodied, with the hope that they may provoke a helpful discussion of the many problems involved. It will be noted that under the act proposed, the power of condemning land in excess is granted in general terms and subject to few restrictions. This is not due to any failure to recognize that this power, like any other, is subject to abuse. It is due rather to the belief that the real merits of excess condemnation as a general working policy in American cities can be demonstrated only by a fair trial, and that such a fair trial may be had only when the municipal authorities exercising it find it a flexible instrument which they can readily adapt to the needs and exigencies of a somewhat erratic and speculative enterprise. If it is to prove satisfactory, the best results will be attained in this way. If it is to fail, it will be because of inherent defects or inadaptability to American municipal conditions, and not to strangulation by inadequate grant of power.

CHAPTER VII

THE CONSTITUTIONALITY OF EXCESS CONDEMNATION

In entering upon a consideration of the constitutionality of excess condemnation, one approaches a problem peculiarly American.[1] The proponents of this policy in the cities and states of Europe or Canada have only to convince the legislatures of the expediency of adopting such a program. In the United States, the case for excess condemnation must be argued first before the legislatures and subsequently before the courts. In fact, one of the most difficult problems which the friends of this system have faced, in this country, has been the problem of quieting the doubts which persistently arise in the minds of legislators and judges as to the constitutionality of excess condemnation. It is the purpose of this chapter to examine this constitutional question.

It may as well be recognized at the outset that American courts cannot be expected to view excess condemnation with any friendly predisposition. It is a policy which involves a somewhat liberal expansion of the power of eminent domain, and that in itself is perhaps sufficient to cause it to be an object of judicial suspicion. The right of eminent domain is "one of the highest powers of sovereignty pertaining to the State itself, and in-

[1] Professor W. F. Dodd states that the power of excess condemnation has been held unconstitutional in Switzerland. (*Entscheidungen des Schweizerischen Bundesgerichts,* Vol. 31 (1905) Part I, p. 645); and Argentina (*Fallos de la Suprema Corte,* Vol. 33, (1888) p. 162). Cited in article on "Political Safeguards and Judicial Guaranties," *Columbia Law Review,* Vol. xv, p. 306, note.

terfering most seriously and often vexatiously with the ordinary rights of property," [2] and it is only natural that grants of authority to use it are strictly construed by the courts and that the exercise of it is set about by numerous restrictions aiming to guard the rights of the individual citizen from wanton infringement. It is in the light of these general principles limiting the right of eminent domain that the problem of the constitutionality of excess condemnation must be viewed, and a discussion of those principles is pertinent at this point.

The law of eminent domain in this country, as everywhere, contains the important guarantee that all private property taken in the exercise of that power shall be paid for. The clause of the Fifth Amendment of the Constitution of the United States, " nor shall private property be taken for public use without just compensation," applies to the national government. The states are bound by similar clauses in their own constitutions as well as by the limitation of the Fourteenth Amendment which has been held to forbid the taking by eminent domain of private property without just compensation, as a taking of property without due process of law.[3] There is no suggestion, however, that excess condemnation would in any way override this fundamental requirement.

The second important principle in the American law of eminent domain is one which has grown out of the doctrine just discussed, through judicial construction. The prohibition against the taking of private property for public use without just compensation has been ex-

[2] Currier Marietta and Cincinnati R. R. Co., 11 Ohio St., 228, 331.

[3] *Black on Constitutional Law*, p. 471, note 9, citing cases; also Lewis, *Eminent Domain*, Sec. 19.

panded by the courts into a prohibition against taking private property for private use, with or without just compensation.[4] In other words, property may be taken by right of eminent domain only for a public use.

It is also a well established principle of the law of eminent domain that the question whether a particular use for which private property is sought to be condemned is or is not public, is a question which can be finally settled only by the courts. A definition of the term "public use" must be sought, therefore, not in statute books but in judicial decisions.[5]

One who seeks to find in the utterances of courts a clear statement of the meaning of the term "public use" is doomed to disappointment. He finds chaos and conflict rather than unanimity or even similarity of opinion. As one court has expressed it:

> No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use," as found in the different state constitutions regulating the right of eminent domain.[6]

This is due primarily to the fact that what is or is not a public use is manifestly not a question of absolute fact but a matter of opinion in respect to which persons will naturally and quite honestly disagree. It is probably for

[4] Taking property for private use has long been held by the state courts to be a violation of due process of law. Such a taking was held by the U. S. Supreme Court to violate the due process clause of the Fourteenth Amendment in the case of Chicago, Burlington and Quincy Railroad Company *vs.* Chicago, 166 U. S., 226 (1896). For a clear statement of the development of this doctrine by the courts see "Taxation for a Private Purpose" by Howard L. McBain, *Political Science Quarterly,* Vol. xxix, pp. 186-188 and notes.

[5] Lewis, *Eminent Domain,* Sec. 251, citing cases.

[6] Dayton Mining Co. *vs.* Seawell, 11 Nev. 394, 400.

this reason that the courts have consistently refrained from enunciating any general definition of the term. They have contented themselves with deciding each concrete question as to whether or not a proposed use for which private property was sought to be condemned was "public" within the meaning of the constitutional provision. In other words, "public use" like "due process of law" is a term the meaning of which, to the extent to which it is established at all, has been established by the gradual process of judicial inclusion and exclusion. Its meaning is to be discovered only by enumerating, first, the uses which in concrete cases have been held to be public, and second, those uses which have been held not to be public.

This refusal on the part of the courts to announce a general definition of the term "public use" has allowed them to give it a flexibility and capacity for expansion of meaning otherwise impossible. Changing conditions and new demands have thus been met by a broadening of the term which bids fair to make the power of eminent domain an effective agent for many of the newer forms of social control. It is not necessary for the purpose of this study to trace in detail this gradual broadening of the meaning of the term "public use." Some notion, however, of the way in which it has been adapted to meet changing conditions may be gained by marking the attitude of the justice of the United States Supreme Court who declared in 1847 that there was no precedent or argument to justify the taking by eminent domain of the land for the site of a courthouse, hospital or jail, "since no necessity seems to exist which is sufficient to justify so strong a measure" [7] and comparing that atti-

[7] Woodbury, J., in West River Bridge Co. *vs.* Dix, 6 Howard, pp. 507, 545.

tude with the viewpoint of the Massachusetts court which recently upheld the condemnation of an easement limiting the height of buildings for the purpose of protecting the beauty, light and air of a public park, asserting that:

> The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement.[8]

The long line of cases in which our courts have been making the term "public use" concrete may be grouped roughly into two classes. In the first of these classes may be placed those decisions which interpret "public use" to mean "use by the public." According to this view, the public, or such portion of it as may be in a position to avail itself of the opportunity, must have the right actually to use the property so taken. Under such an interpretation the more common applications of the power of eminent domain may be readily justified. Highways, parks, playgrounds and public building sites are all open to direct use by the entire community. This view of the term "public use" is supported by a considerable list of authorities and meets the approval of one of the most distinguished commentators in this field of law.[9] It has four advantages: first, it places upon the term in question a very natural and obvious interpretation; second, it is historically sound, because it recognizes the actual uses for which eminent domain was employed when the term "public use" was first introduced; third, it

[8] Attorney-General *vs.* Williams, 174 Massachusetts 476, 478 (1899).

[9] Lewis, *Eminent Domain,* Secs. 257–258, citing cases.

conforms to the well-established doctrine that the right of eminent domain, being in derogation of private rights, must be strictly construed; and fourth, "it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application."[10]

These arguments supporting the view which makes the term "public use" synonymous with "use by the public," have not been universally appealing. Another interpretation prevails in many jurisdictions, which construes "public use" to mean public welfare or advantage. A broader application of the term would seem to be necessary if the courts are to sustain the exercise of the right of eminent domain for the purpose of opening an irrigation ditch over a man's land for the benefit of his neighbor,[11] or for the operation of an aerial tramway over another's land for the conveying of ore from a mine to a place of shipment.[12] In neither one of these cases was the land or property right which was condemned actually used by the public, nor could it have been so used. The irrigation of a whole district or the adequate development of its natural resources may depend, however, upon the power to make such uses of the right of eminent domain, and if private property may be taken for any purpose which contributes to the general benefit or advantage of the community, there could be no question as to the legitimacy of such proceedings as these. This liberal view of the meaning of the term "public use" is well expressed in the words of the Supreme Court of Idaho:

[10] Lewis, *Eminent Domain,* Sec. 258, p. 507.

[11] Clark *vs.* Nash, 27 Utah, 158 (1903).

[12] Highland Boy Gold Mining Co. *vs.* Strickley, 28 Utah, 215 (1904). Affirmed by United States Supreme Court in 200 U. S., 527.

It is enough if the taking tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community.[13]

This doctrine has of necessity been given recognition in those states in which the adequate development of natural resources has demanded the exercise of the right of eminent domain in cases where the narrower theory of "use by the public" could not apply.[14] It is not a doctrine which has found general acceptance elsewhere and does not, in all probability, represent the weight of authority on the question of public use.

In the light of these general principles of the law of eminent domain the constitutionality of excess condemnation must be settled. Is the purpose for which the public authorities take the surplus land a use which the courts will regard as public? By that test the policy must stand or fall. Before attempting to discuss any general considerations or to present conclusions upon that point, it will be worth while to touch briefly upon the various cases in which the validity of excess condemnation statutes has actually been passed upon by the courts, either collaterally or directly.

The first utterance by an American court upon the constitutionality of excess condemnation appears to have been that of the Supreme Court of South Carolina, in the

[13] Potlatch Lumber Co. *vs.* Peterson, 12 Idaho, 769. In none of these cases is there actually "use by the public" of the thing condemned; there is merely the exercise of the right of eminent domain for the purpose of allowing an individual or a group of individuals to carry on an enterprise which is of general community benefit.

[14] See Lewis, *Eminent Domain*, Sec. 257 and cases cited.

case of Dunn *vs.* the City Council of Charleston, decided in 1824.[15] A state statute passed in 1817 had conferred on the City Council of Charleston what they, at least, supposed to be the power to condemn remnants of land. It provided that the City Council might, in connection with widening a street, purchase the "lots fronting on such street," if the owner consented; and if he did not consent or if he demanded an unreasonable price, the council was authorized to take such lots anyway at a price fixed by a board of arbitrators.[16] Acting under authority of this statute, the City Council of Charleston took the whole of a plot of land owned by Dunn, a part of which they needed for a street, and sold the remainder "consisting of a large and valuable lot" for double the amount which they had offered to pay him for it. Dunn

[15] Harper's Law Report, 189.

[16] 7 Stat., 136.

Clause 1. "Whenever the City Council of Charleston shall think it expedient to widen any street, lane or alley, they shall first submit the plan of the intended improvement to a board of nine commissioners to be named and appointed from time to time by the legislature, and if approved and sanctioned by the said board, then the said City Council shall have full power to purchase the lots fronting on such street, alley, or lane, and the fee simple of such lot or lots shall be vested in the City Council from the day of the deed of sale."

Clause 2. "In case the owner or owners of such lot or lots, fronting on such street, alley, or lane, shall refuse to sell his or her lot or lots, or shall demand for the same what may be deemed an unreasonable price by the City Council, then the City Council shall nominate and appoint not less than three freeholders, resident in the city, who shall meet an equal number to be named and appointed on the part of the owner or owners, to determine and fix on the real and true value of such lot or lots, with full power in the commissioners, appointed as aforesaid, in case of disagreement, to call in one other commissioner, and on the City Council paying the full value of said lot or lots, fixed and determined on in the manner above designated, the fee simple of the said lot or lots shall be vested in them."

appealed to the court for a prohibition to restrain this alleged infringement of his rights.

In the view of the Supreme Court of the state this case presented two questions: first, "whether the act of 1817 authorizes the City Council to take any more of the land belonging to the plaintiff than was necessary for the purpose of widening the street"; and second, "if it does, whether the Legislature, in delegating such authority, have exceeded their constitutional powers."

In considering the purport of the statute in question the court admitted that "if we confine ourselves to the letter of the law, it certainly will admit of the construction contended for on the part of the City Council . . . It is taking a superficial view of an act, to adhere to its letter. We must look to the spirit and design of the law." The court then launched into a disquisition on the possible meaning of the word "lot" the substance of which was, that "the word *lot* is of ambiguous import, and although, when speaking in relation to town lots, we usually have reference to some particular portion or section of the town, yet we have no definite idea of any given quantity of land." From this point, by a process of reasoning not easy to follow, the learned judge soon found himself at the conclusion he had apparently made up his mind to reach; that "the construction which best meets the views of the Legislature, and which best comports with the true spirit and design of the law, is to give to the City Council the power to take as much land, or such parts of the lots, as is necessary for the street, and no more."

Turning to the second question, the validity of the statute if construed as granting the power to condemn the land remnants, the court declared that the point really raised was, "whether the Legislature has the constitu-

tional right of taking the property of one individual, and transferring it to another, or to a body corporate, for their own individual benefit and emolument." The answer to this question was admittedly dictum and was advanced because the question itself was one which was easy to answer. The state constitution contained the provision that "no freeman shall be disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land." All commentators were agreed that the expression "the law of the land" was intended to act as a check on the exercise of arbitrary power. The constitution itself was based upon certain well-established principles of common law and common justice.

> Any act of partial legislation, which operates oppressively upon one individual, in which the community has no interest, is not the *law of the land*. . . . To take the property of one man, and give it to another, would be contrary to all those immutable principles of justice and common law, which have been consecrated by universal consent from time immemorial, and which are secured to us by the plain and unequivocal language of the Constitution. Such would be the effect of the act in question.

In this case, in short, because convinced that a statute conferring power to condemn property in excess of actual needs would be a taking of that property contrary to the law of the land, or, to use the modern term, in violation of due process of law, the court skilfully construed the statute in such a way as to avoid the necessity of declaring it unconstitutional.

The validity of an act authorizing the condemnation of remnants of land came before the highest court of

the state of New York for decision in the year 1834. This was in the case of "The Matter of Albany Street."[17] A New York statute of 1812 provided that in all cases where only a part of a lot or parcel of land should be required for a public improvement the public authorities of the city of New York might, if they thought it expedient, take the entire lot. The part not needed for the particular improvement might then be devoted to some other public use or sold.[18] The commissioners of estimate and assessment entered upon the project of extending Albany Street, an improvement which made it necessary to appropriate for street purposes a strip of land running through the center of Trinity Churchyard. Acting under authority of the statute in question, the commissioners proceeded to condemn not only the land necessary for the street, but also a part of the churchyard lying outside the lines of the proposed highway. The Trinity Corporation promptly contested their right to take this surplus land, and the validity of the act of 1812 was placed squarely before the court.

The court disposed of that question in a paragraph that is brief enough to make possible its quotation in full and is striking enough to make such quotation worth while.

The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of another. It is in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported. This power has been supposed to be convenient, when the greater part of a lot is taken, and only a small part is left, not re-

[17] 11 Wendell, 149. [18] Laws of 1812, Ch. 174.

quired for public use, and that small part of but little value in the hands of the owner. In such case the corporation has been supposed best qualified to take and dispose of such parcels or gores as they have sometimes been called; and probably this assumption of power has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received the deliberate sanction of this court. Suppose a case where only a few feet or even inches are wanted from one end of a lot to widen a street, and a valuable building stands upon the other end of such lot, would the power be conceded to exist to take the whole lot, whether the owner consented or not? Or suppose the commissioners had deemed it expedient and proper, in this case, in the language of the statute to take the whole of the churchyard, the act would have been equally within the letter of the statute, with their act in the present case, and yet no one would suppose that the legislature ever intended to confer such a power. The quantity of the residue of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legislature thus to dispose of private property, whether feet or acres are the subject of this assumed power. I am clearly of opinion that the commissioners have no right to take the strip of land in question against the consent of the corporation of Trinity Church.

It is interesting to note that the court faces squarely the question whether the taking of remnants of land can be justified as incidental to the condemnation of the land actually necessary—the view later taken by the Supreme Court of Massachusetts—but repudiates that theory on the ground that the "quantity of the residue of any lot cannot vary the principle." Under the decision in the Albany Street case, nothing savoring of excess condemnation could be sustained; and that case was fol-

lowed in the subsequent decisions of the New York courts [19] and cited with approval in many other jurisdictions in dealing with related problems.

The doctrines of law which were laid down in the two cases just discussed would probably meet with general acceptance in most American state courts. They do not, however, meet with unqualified acceptance in the Supreme Court of Massachusetts. The so-called Remnants Act which was passed in 1904, in Massachusetts, has already been discussed at some length.[20] It permitted the public authorities to condemn the whole of a plot of land, part of which was needed for the purposes of a public improvement, when the part not thus needed would be "unsuited for the erection of suitable and appropriate buildings." For several years after this act was passed no city availed itself of the power conferred and consequently the question of its constitutionality was never presented to the courts in a direct action. In 1910, however, the Supreme Court of the state met this question collaterally and gave its opinion that the law was valid. In that year the legislature of Massachusetts, according to a practice prevailing in that state, asked the Supreme Court for an advance opinion upon the constitutionality of a statute conferring broad powers of excess condemnation.[21] The way in which this question

[19] Embury *vs.* Conner, 3 N. Y., 511 (1850) decided that the act of 1812, which was under review in, The Matter of Albany Street, 11 Wendell, 149, was constitutional if interpreted so as to give the commissioners of estimate and assessment authority to take the whole of a lot part of which was needed for public purposes upon the consent of the owner of such residue. The doctrine of the Albany Street Case was reaffirmed. The leading case is also followed in Bennett *vs.* Boyle, 40 Barber (N. Y. Sup. Ct.) 551 (1863).

[20] *Supra,* p. 62ff.; Ch. 443, acts of 1904.

[21] *Supra,* p. 105ff.

was answered will be considered at a later point,[22] but in the course of the opinion submitted the court had occasion to refer to the Remnants Act of 1904 for purposes of analogy and intimated that it regarded it as constitutional. The legislature apparently interpreted this as a constructive suggestion and thereupon asked the court if the excess condemnation law they were seeking to frame would be constitutional if it contained provisions similar to those found in the act of 1904.

In answer to this question the court replied as follows:

We are asked whether it would make any difference if the proposed statute contained provisions like those of the statute of 1904, chapter 443, section 6. In our opinion, given to the House of Representatives, we intimated that this statute is constitutional. In our judgment it goes to the very verge of constitutionality. The grounds on which we are inclined to sustain it have little relevancy to the stated purpose of the unusual provisions of the proposed statute. They are: first, that there can be no taking outside the location of the public work, except of a remnant of an estate a part of which is actually required for the laying out, alteration, or location of the public work, and then only if the remnant left after taking such part would, from its size or shape, be "unsuited for the erection of suitable and appropriate buildings"— in other words, only when there is a remnant that is too small or too ill shaped to be of any practical value for the use to which valuable land is commonly put; and, secondly, that such a remnant can be taken only upon an adjudication that public convenience and necessity require the taking. Unless it can be said that public convenience and necessity never can require the taking of such a remnant the statute cannot be declared unconstitutional. While it is plain that a city or town cannot take land outside a public work for speculative

[22] *Infra*, p. 290ff.

purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape and of so little value, that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the questions before us.[23]

It is interesting to note that there is a direct conflict between the view here expressed and the doctrine enunciated by the New York court in the Albany Street case. In the earlier case the judge had repudiated the theory that the amount of land which was taken by eminent domain in excess of actual needs could in any way affect the principle controlling the legitimacy of that taking. The Massachusetts court, on the other hand, distinctly states that while an excess taking on a large scale is indefensible under the constitution of that state there might be plots of land of such small size and low value that their condemnation in excess of actual needs would be regarded as "incidental and reasonably necessary" to the major project in hand. No other jurisdiction has, as yet, followed this view of the Supreme Court of Massachusetts.

The cases thus far discussed have all dealt with the validity of statutes authorizing the condemnation of remnants of land. That was the only type of excess condemnation which was tried out in the American states until recent years. In one or two other cases, however, the constitutionality of a liberal and thoroughgoing grant of the power of excess condemnation has lately come before the courts.

[23] Opinions of Justices, 204 Massachusetts 616, 619-20 (1910).

The first judicial utterance upon this broader question was that of the Massachusetts Supreme Court in the opinion just mentioned. The general character of the project which the legislature was promoting has already been indicated.[24] After reciting the need for a commercial thoroughfare in the city of Boston and the inability of the public authorities to create such an improvement through existing means, the legislature propounded the following question to the court:

> Is it within the constitutional power of the Legislature to authorize the city of Boston, or such other public authority as the Legislature may select, to lay out such a thoroughfare and rear streets, and to take not only the land or easements necessary for the same, but also such quantities of land on either side of said thoroughfare or between the same and said rear streets, as may be reasonably necessary for the purposes hereinbefore set out, with a view to the subsequent use by private individuals of so much of that property taken as lies on either side of said thoroughfare, under conveyances, leases, or agreements which shall embody suitable provisions for the construction on said land of buildings suited to the objects and purposes hereinbefore set out, and for the use, management and control of said lands and buildings in such manner as to secure and best promote the public interests and purposes hereinbefore referred to; assuming that the act provides just compensation for all persons sustaining damage by the said takings?[25]

The court answered this question in the negative. The project contemplated involved an exercise of the right of eminent domain and a use of the taxing power to carry out the necessary improvements. The question was directly raised whether the land outside the thoroughfare

[24] *Supra*, p. 105ff.
[25] Opinions of Justices, 204 Mass. 604, 608-609 (1910).

would be taken for a public use. "It is plain that a use of the property to obtain the possible income or profit that might accrue to the city from the ownership and control of it would not be a public use. . . . It is equally true and indubitable that a management and use of such property to promote the interests of merchants or traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public but a private use of the real estate." In support of this view the court cited a long series of cases decided in the state and federal courts holding that government aid afforded to private business enterprises was unconstitutional as involving the exercise of the taxing power for a private purpose. It quoted with special approval an excerpt from one of its earlier opinions declaring:

> The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental.[26]

After commenting upon a number of analogous cases, the court finally crystallized its opinion with this statement:

> An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of the thoroughfare, or the shop of a humble tradesman, and

[26] Lowell *vs.* Boston, 111 Massachusetts 454, 461. This held unconstitutional a statute which permitted the city of Boston, after the great fire of 1872, to borrow money on lands and lend it on mortgages to the owners of land whose buildings had been burned.

compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be more profitable, and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain or the expenditure of public money has been justified on such grounds.[27]

About a month after receiving this opinion from the Supreme Court the legislature of Massachusetts, unwilling to see frustrated its effort to frame an excess condemnation statute which would be constitutional, changed the form of the question first submitted and asked for another opinion. The first change in the question was to inquire if excess condemnation could be used in constructing the proposed thoroughfare provided such excess taking were necessary in order to secure a highway

adapted especially to the requirements of those forms of business which to a large extent employ teaming, thereby relieving congestion of teaming traffic on streets in the vicinity or at least helping to prevent an increase thereof and so facilitating the transportation of freight and passengers through the section of the city in which the way is located.[28]

There is evident here an effort to supply the public use to justify the taking of the excess land which the court, in its previous opinion, had declared was lacking. That effort did not, however, succeed. The court dismissed the point with the statement: "That teaming may be necessary in carrying on these different kinds of business seems to us to have little bearing on the question whether land

[27] *Op. cit.*, p. 614.
[28] Opinions of Justices, 204 Massachusetts, 616.

along the sides of a street should be taken by the city or left to the owners."

The legislature modified its question to the court in the second place by adding the inquiry whether the addition to the statute already proposed of provisions similar to certain of those in the Remnants Act of 1904 would save the statute. The provisions in question stipulated that a commission should be appointed by the court on the petition of the owner of remnants sought to be taken to determine whether or not such remnants were actually unsuited for the erection of suitable buildings, and whether the public necessity and convenience justified their taking. It was in answer to this point that the court launched into the discussion of the validity of the act of 1904 which has already been summarized,[29] and pointed out the distinctions between that act and the one under consideration. The second question was accordingly answered in the negative. The result was the Massachusetts Constitutional Amendment of 1911.[30]

The Supreme Court of Massachusetts has expressed further views as to the limitations placed on the right of eminent domain in two somewhat analogous cases.

A statute of 1912[31] authorized a specially created park commission to condemn any or all of certain lands along the seashore and to sell or lease such lands as might not be needed, as a public reservation with or without restrictions as to their future use. This well-nigh unrestricted power of condemnation and resale was declared invalid by the Supreme Court of the state on the grounds of lack of public purpose. The statute did not itself

[29] *Supra*, p. 288.
[30] Art. X, Part I.
[31] Ch. 715.

suggest any purpose, public or otherwise, on the ground of which the takings could be justified.[32]

In 1912, the legislature asked the Supreme Court for an opinion on the constitutionality of a bill, then pending, which authorized the Homestead Commission to purchase land for the purpose of developing it, and building thereon workmen's dwellings which it might sell or rent to persons of the laboring class. The answer of the court is summed up in this excerpt from their opinion:

> Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principles of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage-earner might be taken by the power of the commonwealth for the purpose of handing it over to another wage-earner. Neither the power of taxation nor of eminent domain goes to this extent.[33]

As a result of this opinion a constitutional amendment was proposed and ratified in 1915 authorizing the Homestead Commission to condemn land for the purposes of relieving congestion of population and providing homes for citizens.[34]

The question of the constitutionality of a general grant of excess condemnation next arose in the state of Maryland, but the pronouncement of the Supreme Court of the state upon that question was not particularly clear. The legislature of Maryland had passed, in 1908, an ex-

[32] Salisbury Land and Improvement Co. *vs.* Commonwealth, 215 Massachusetts, 371 (1913).

[33] Opinions of Justices, 211 Massachusetts, 624 (1912).

[34] For text of amendment see Laws 1914, p. 1056.

cess condemnation act applicable to the city of Baltimore.[85] This statute had authorized the public authorities of that city to condemn any land adjacent to certain specified kinds of public improvements the use of which it might be deemed beneficial to subject to lawful control, and to resell such lands, subject to restrictions which would make that control effective.

In 1910, a statute was passed authorizing the city of Baltimore to open a new highway. The project was known as the Jones Falls improvement. The act conferred upon the mayor and council of the city the power to "open, construct and establish a public highway in the city of Baltimore (specifying its exact location and direction) . . . and to acquire for said purposes landed or other property in the bed of said highway and adjacent thereto on either or both sides thereof," stipulating that there should be duly designated upon a plan the "property, landed or other, that is to be acquired in, along or adjacent to said highway" and further authorized the mayor and council to delegate to the "Commission on City Planning" the power to construct the highway,

> to condemn and acquire by purchase or condemnation the lands and property mentioned in the last preceding section of this act, and such other powers possessed by said Mayor and City Council of Baltimore, relating to the laying out, opening and constructing of highways, and acquiring property, landed or other, adjacent thereto, as it may deem proper, including the powers vested in it by chapter 166 of the acts of the General Assembly of Maryland, passed at its session of the year 1908

(the excess condemnation statute referred to). The act also provided that

[85] Laws of Maryland 1908, Ch. 166.

> any landed or other property acquired under the provisions of this act, excepting land lying in the bed of said highway, may, after said highway has been laid out, be sold by the Mayor and City Council of Baltimore or said Commission, if power to make such sales be, as it may be, delegated by ordinance to said Commission, for such prices, at such times and on such terms as may by ordinance be provided.[86]

The final sections of the statute authorized the issuance of bonds, under stated conditions, to pay for the improvement.

In June, 1910, the mayor and council of Baltimore passed an ordinance providing for the issuance of bonds necessary to carry through the Jones Falls improvement. A year later the validity of the act of 1910, and the ordinance passed under it, was attacked before the Supreme Court of the state in an action to secure an injunction restraining the city from proceeding with the sale of the bonds.[87]

In this case the court, after disposing of the preliminary contention that the act in question embraced more than one subject, proceeded at once to a determination of the question whether it provided for the taking of private property for uses which are not public. Since this decision rests upon a somewhat intricate statutory construction a rather extended quotation from the opinion of the court is perhaps permissible.

> This brings us to the second objection to the validity of the act, and that is, does it authorize the taking of private property for uses other than public uses.
>
> The complete answer to this objection, it seems to us, is that the act does not authorize the condemnation of private

[86] Laws of Maryland, 1910, Ch. 110.

[87] Duke Bond *vs.* The Mayor and City Council of Baltimore *et al,* 116 Maryland, 683 (1911).

property by the city for any purpose other than a public use.

Section 1 of the act states the purpose for which property may be taken by the city, and that is clearly stated to be for the purpose of constructing the highway over Jones Falls, its connections with streets crossing said highway, and to acquire for said purposes land or other property in the bed of the highway and adjacent thereto.

The use of the expression "to acquire for said purpose" in the act, plainly limits and designates the purpose for which property may be taken by the city, and, as we have said, for the purpose of constructing a public highway over Jones Falls and connecting it with other public streets crossing it.

In other words, we think, it is clear that the only purposes for which property is authorized to be condemned are those set out in section 1, of the act, to wit: for the purpose of establishing a public highway over Jones Falls and making connections between said highway and other highways crossing or adjacent thereto. And this being so, there can be no possible or serious dispute, that the use for which property may be required and can be taken, under section 1 of the act, is for a public use; and being for a public use, the act is not open to the objections urged against it.[38]

There is nothing in the other section of the act, which would lead to a different conclusion in this respect, or would in any way sustain the appellant's contention in this case. The words "landed and other property acquired," mentioned in the other sections of the act, manifestly refer and relate to landed or other property to be acquired "for the purposes" under section 1, of the act.

The validity of the power given by the act to acquire land or other property, adjacent to the highway, on either

[38] Citing cases on "public use" and also Acts of 1908. Ch. 166 excess condemnation statute.

or both sides thereof, incident to and for the purposes of the construction of the highway and its connections, has uniformly been sustained and upheld by the courts.[39]

It cannot be assumed in this case that the city will undertake to condemn or take property for purposes other than those authorized by the act. The presumption is that the city will act within its rights and not beyond them. It will be time enough to pass upon this question when it properly arises before us.[40]

There are two views which may be taken of the significance of this case so far as it affects the constitutionality of excess condemnation. It is possible to interpret it, in the first place, as a practically complete emasculation of the excess condemnation act of 1908. According to this view the Supreme Court of the state by a process somewhat similar to that employed by the South Carolina court in case of Dunn *vs.* Charleston,[41] has so interpreted this act as to make it constitutional and by so doing has read out of it any real power of excess condemnation. In other words the power to condemn land in excess, which was sought to be conferred by the statute of 1910, means only the power to condemn land for purposes incidental to the construction of the highway such as land used for cuts, fills and connections with other highways. This view is strengthened by the fact that the court, in declaring that the right of the city to condemn land for such incidental purposes has long been accepted without serious question, cites the act of 1908 conferring power of excess condemnation. If this interpretation of the case is correct, then the grant

[39] Citing cases and again citing the excess condemnation act of 1908.

[40] Duke Bond *vs.* Mayor and City Council of Baltimore *et al,* 116 Maryland, 683.

[41] *Supra*, p. 283ff.

of the power to condemn land in excess is practically meaningless, and the act of 1908 adds nothing to the power already possessed by the city.

It is possible, however, to look at this case in a somewhat different light. The act of 1908 is incorporated into the act of 1910, and as a consequence such powers as are conferred by the former statute are limited in scope and controlled by the statement of purpose contained in the latter act. Since the purpose set forth in the act of 1910 for the exercise of the power therein conferred is somewhat narrow — "to open, construct and establish a highway" — only such powers conferred by the act of 1908 as contribute directly to the accomplishment of that purpose are called into operation. This is very far from saying that other powers, such as the power of excess condemnation for protective purposes, might not have been made available, had the act of 1910 been less limited in scope. In other words, the court does not have before it in this case the question whether or not the power of excess condemnation may be constitutionally exercised, but only the question of the propriety of making use of such powers granted by the excess condemnation statute as may directly contribute to the definite purpose set forth in the later act. The question of "public use" for which land is sought to be condemned is applied not to the whole range of purposes for which private property might be taken under the excess condemnation act, but only to the purpose for which it may be taken under the act of 1910.

It is believed that this latter view is correct. It is hard to believe that a state supreme court would annul an important statute by a process of indirection. One cannot read the opinion in this case and feel that the question of the constitutionality of excess condemna-

tion is fairly met and decided or that the court intended to have it so regarded.

The first and only statute conferring broad powers of excess condemnation to be brought through actual litigation before the supreme court of a state was the Pennsylvania act of 1907. The main features of this law have already been mentioned.[42] It provided that cities might condemn land within two hundred feet of a park, boulevard or street and later sell the surplus land so taken under protective restrictions. Philadelphia was the first city of the state to take advantage of the powers granted by this statute. An ordinance passed July 3, 1912, authorized the condemnation of certain parcels of land adjacent to the new Fairmount Parkway, and an ordinance of January 16, 1913, provided for the sale of these parcels to certain parties named in the ordinance. The owner of the land thus taken brought action in the Common Pleas Court to restrain the appropriation of his property on the ground that the act of 1907 and the two ordinances passed under it were unconstitutional.[43]

The lower court upheld the validity of the excess condemnation statute and ordinances in a notable opinion handed down by Judge Sulzberger. The vital issue was of course the question of public use. After citing numerous cases in which the Pennsylvania Supreme Court had upheld the exercise of the right of eminent domain in connection with agricultural and horticultural expositions on the ground that such institutions had educative value, the learned judge proceeded:

If the Parkway, from the City Hall to Fairmount Park, may be made to exhibit the best results of architectural skill

[42] *Supra*, p. 110.

[43] Pennsylvania Mutual Life Insurance Co. *vs.* Philadelphia, 22 Pennsylvania District Reports, 195.

and of industrial achievement in the building art, it would seem to be an exposition quite as useful as if it were devoted to the arts of agriculture and horticulture. The utilitarian feature, that the avenue will attract strangers from abroad and thus benefit the city's general trade and commerce, detracts nothing from the educative quality of the exposition, but adds a new ground of public usefulness.[44]

The court then turned to what it admitted to be a very difficult question — whether land is taken for a public use which is later sold in fee to a private party.

The precise question appears not to have been raised in any reported case in this commonwealth. There are, however, cases in other jurisdictions which hold that a city may be authorized to acquire by eminent domain, an easement in the property of private persons. (Attorney-General *vs.* Williams, 174 Massachusetts, 476.) While we may not follow this as authority we cannot ignore the force of its reasoning. The case before us is one of first impression, and we should not be astute to declare that the legislature has exceeded its powers, when we are unable to point to any principle of the Bill of Rights or any specific section of the Constitution which has been violated or trenched upon. The legislature is presumed to interpret the Constitution with fidelity and intelligence, and though its construction is subject to review by the courts, it may not be set aside, especially by a court of first instance, unless it is obviously erroneous. We cannot say that the statute of 1907 is in clear violation of the Constitution. After all, condemning the property, charging it with the servitude and then selling it subject to the public's easement, is nothing more than acquiring an easement; and we do not think the difference between acquiring it directly and acquiring it indirectly is essential or important. The substantial thing is that the public may by condemnation acquire not only visible property

[44] *Idem*, 201.

but also an easement, though it be invisible and immaterial. . . . In our opinion, the act of 1907 is constitutional.

The court, however, declared void the second ordinance which provided for the sale of the surplus property on the ground that it did not specify the restrictions on the future use of that property which alone constituted the public purpose necessary to sustain the taking of the excess land.[45]

An appeal was at once taken to the Supreme Court of the state, and that tribunal reversed the decision of the court below and declared the excess condemnation act of 1907 and the ordinances passed in pursuance of it unconstitutional.[46] Before proceeding to a discussion of the case in point the court raised the question already mentioned above,[47] whether "public use" in connection with the law of eminent domain shall be interpreted to mean "public welfare, utility or advantage" or "use by the public." After an elaborate examination of the cases and authorities on the subject, the balance fell for the court on the side of the narrow interpretation.

We think this interpretation of the words "public use" is in accord with their plain and natural signification and the weight of the best considered authorities. It furnishes a certain guide to the legislature as well as to the courts in appropriating private property for public use. It enables the state and the owner to determine directly their respective rights in the latter's property. If, however, public benefit, utility or advantage is to be the test of a public use then, as

[45] The restrictions which it planned to place in the actual deeds of resale were held not to be sufficient, as the act required the restrictions to be imposed by legislative action.

[46] Pennsylvania Mutual Life Insurance Co. *vs.* Philadelphia 242, Pennsylvania State, 47 (1913).

[47] *Supra*, p. 279.

suggested by the authorities, the right to condemn the property will not depend on a fixed standard by which the legislative and judicial departments of the government are to be guided, but upon the views of those who at the time are to determine the question. There will be no limit to the power of either the legislature or the courts to appropriate private property to public use, except their individual opinions as to what is and what is not for the public advantage and utility. If such considerations are to prevail, the constitutional guarantees as to private property will be of small moment.[48]

Applying this test, then, of "use by the public" to the exercise of eminent domain authorized by the act of 1907, the court concluded that that statute permitted the taking of private property for a use which is not public inasmuch as it permitted the resale of the surplus land condemned.

The protection of the highway is the only "public use" to which the land is to be applied. The property is not to be taken and held by the city for any use for which a statute confers on the city the right to appropriate it. Saving the restriction contained in the conveyance, the city can exercise no control over it, and hence cannot use it for any purpose. The only possible "use," therefore, which the city can make of the property is to impose restrictions on it or impress it with an easement in the hands of the city's vendee.[49]

This being the case the act in actual effect provided for the taking by eminent domain of the property of one citizen and vesting the title to that property in another. The court concluded its argument with a bitter denunciation of the statute on that ground.

It is true that in the present case the declared purpose in

[48] *Idem,* pp. 54-55.
[49] *Idem,* p. 55.

taking the property is to protect the highway and preserve the light, air, etc.; but, if that be conceded to be a legitimate public use, the city is not permitted to hold it for that or any other public purpose. The statute compels the city to sell and divest itself of the control or use of the property. The restriction imposed by the act which is to be inserted in the deed does not remove the objection that the act authorizes the city to take the property from one citizen without his consent and transfer it to another. The act does not require the property to be resold to the party from whom it has been taken, which might justify the contention that the only purpose in making the appropriation was to impose an easement for the benefit of the highway, but it is to be held by the city as a fee simple owner who can sell to whomsoever it pleases. It deprives the owner of his right to accept the restrictions and retain the property on the same terms as the city's vendee would hold it. It empowers the city at the pleasure of its officials to transfer property on which is a business plant owned by one individual or corporation to another who is engaged in the same or another business. One man may be deprived of his home for the benefit of another. In view of its provisions conferring almost unlimited discretion on cities or their officials in exercising the powers granted, it is idle to say that the statute furnishes no opportunity to produce such results or to promote a private purpose.[50]

It is doubtless true that the powers sought to be exercised by the city, under the excess condemnation statute, seemed the more arbitrary and unjustifiable by reason of the fact that, even before the parcel of land in question was taken, an informal understanding was entered into between the city and a certain corporation which wanted the land, that, when acquired, it would be sold to it. This corporation desired to erect a business block of a size and dignity which would make it an appropriate

[50] *Idem*, pp. 51–58.

structure to front the new parkway. The parcel in question was itself too small to be put to such a use, and the authorities felt that the public interest demanded the transfer of the property which was attempted. These circumstances gave particular force to the argument of the court that this was an exercise of the power of eminent domain for the purpose of taking the property of one man and transferring it to another. The holding of the case cannot, however, be said to be controlled by these particular circumstances, and the grounds upon which the opinion rests are broad enough to condemn any exercise which might have been attempted, of the powers contained in the statute of 1907.

Since there is usually room for a difference of opinion regarding the exact significance of a judicial utterance, the arguments upon the basis of which the constitutionality of excess condemnation has been decided in the foregoing cases have been presented for the most part in the words of the courts themselves. Those arguments may now be summarized and certain conclusions drawn.

In the first place, the grounds upon which the power of excess condemnation has, from time to time, been held unconstitutional group themselves under three heads. First, the "public use" for which private property may be taken by eminent domain means "use by the public," and such "use by the public" is impossible when the city plans later to dispose of the property it has condemned as in the case of excess condemnation.[51] Second, without relying upon the "use-by-the-public" rule, the promoting of commercial and industrial development (through the creation, for example, of a business

[51] Pennsylvania Mutual Life Insurance Co. *vs.* Philadelphia, 242, Pennsylvania State, 47.

thoroughfare) is not a purpose which is "public" in the sense of justifying the condemnation of land or the use of taxation.[52] Third, the actual result of excess condemnation, whatever may be the motive back of its use, is to take the property of one man by eminent domain and transfer it to another. This violates "the spirit if not the letter of the Constitution,"[53] and deprives a citizen of his property "contrary to the law of the land."[54]

There are two grounds upon which the power to condemn land in excess has received judicial approval. In the first place, as applied for the purpose of protecting the beauty and usefulness of a boulevard or park, excess condemnation involves the taking of private property by eminent domain for educational and esthetic purposes and such purposes constitute a "public use."[55] And second, the condemnation of remnants of land is an exercise of the right of eminent domain for a use necessary and incidental to a public purpose.[56]

It is evident that the judicial mind has viewed excess condemnation from two entirely different angles. One line of opinion has limited itself to examining merely the immediate process of excess condemnation without regard to the broad purpose for which that policy is being employed. It sees only the fact that property is taken from one man by eminent domain and later on sold or rented to another. The very nature of excess condemnation precludes there being "use by the public" of the

[52] Opinions of Justices, 204 Massachusetts, 607; 209 Massachusetts, 616.

[53] The Matter of Albany Street, 11 Wend., 148.

[54] Dunn *vs.* City Council of Charleston, Harper's Law Report (S. C.), 189.

[55] Pennsylvania Mutual Life Insurance Co. *vs.* Philadelphia, 22 Pennsylvania District Reports, 195.

[56] Opinions of Justices, 204 Massachusetts, 616.

property taken, and such "use by the public" is the only legitimate definition of "public use." In the eyes of these judges, no form of excess condemnation is constitutional since the defect lies in the very nature of the policy.

The other judicial viewpoint applies its constitutional test, not to the details of the transaction which takes place in the actual operation of excess condemnation, but to the general purpose for which the policy is employed. In other words, excess condemnation is a means to an end and the constitutionality of a measure embodying it depends upon the public or non-public character of that end. It would not be accurate to say that these courts define "public use" for which land may be taken by eminent domain as synonymous with public utility or advantage, because there are many purposes directly promoting the public welfare for which they would not permit land to be condemned. They retain the privilege of discriminating between the many uses for which excess condemnation may be employed. They are free to declare unconstitutional its use for the purpose of promoting the commercial interests of the city, by opening a business thoroughfare or for the purpose of making a profit for the city from the resale of the surplus land. At the same time they are not precluded from upholding the use of excess condemnation for the purpose of replotting unusable remnants of land or for the protection of the beauty and usefulness of a public improvement.

It would be mere idle speculation to attempt to predict which of these two viewpoints would be adopted by the courts of those states in which the question of the constitutionality of excess condemnation has never arisen. There is some reason to suppose that the weight of authority would continue to lean in the direction of the

narrower and more conservative position. At any rate the proponents of excess condemnation, unwilling to run the chance of having their efforts frustrated by the courts, are laying the foundations of their policy in constitutional provisions.

Even if every state constitution should be amended so as to authorize the use of excess condemnation, the question of the constitutionality of that policy would not necessarily be settled. There remains the question of its validity under the provisions of the Constitution of the United States. Is excess condemnation in violation of the due process clause of the Fourteenth Amendment? Will the Supreme Court of the United States sustain an excess condemnation statute?

It is usually not profitable to try to prophesy how that tribunal will answer a rather novel question of this kind. An examination of its attitude in certain analogous cases, however, will make clear some, at least, of the considerations in the light of which the validity of such a statute would be tested.

In the first place, the Supreme Court has definitely repudiated, as a universal test, the "use by the public" doctrine of public use.[57] In sustaining state statutes conferring the right to condemn irrigation ditches or conveyor belt easements, the court declared that what was or was not a public use for which land might be condemned by eminent domain was a question which must be answered in the light of the varying conditions in the different states. Thus it has not tied its hands by the enunciation of any narrow definition of the term "public use," but has definitely expressed its intention of defin-

[57] Strickley *vs.* Highland Boy Mining Co., 200 U. S., 527, 531 (1905); Clark *vs.* Nash, 198 U. S., 361, 367ff. (1904); Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112, 159, 160 (1896).

ing that term with considerable elasticity to meet the needs of various states in dealing with their special problems.

In the second place, the Supreme Court views with highest respect the interpretation which the state courts themselves have placed in individual instances upon the term public use. In other words, it will be inclined to be as liberal, at least, as are the state courts in construing that term. This attitude is well summed up by Mr. Justice Moody in the case of Hairston *vs.* Danville and Western Railway Company.[58]

> No case is recalled where this court has condemned, as a violation of the Fourteenth Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. . . . We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however,[59] show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. . . . It remains for the future to disclose what cases, if any, of taking, for uses which the state constitution, law and court approve, will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States.

It is believed that the Supreme Court would be equally reluctant, save in exceedingly clear cases, to declare unconstitutional under the due process clause a statute enacted by a state legislature in pursuance of authority definitely granted by a provision of a state constitution.

[58] 208 U. S., 598, 607 (1907).

[59] Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112; Clark *vs.* Nash, 198 U. S., 361; Strickley *vs.* Highland Boy Mining Co., 200 U. S., 527.

In the light of these facts it seems fair to assume that the judgment of the Supreme Court upon the constitutionality of excess condemnation will depend upon the purpose for which that policy is used. If the only motive for the application of that scheme was to secure to the city treasury the profit which might accrue from the resale of the surplus land taken it could probably be argued with much cogency that the financial need of the city did not constitute a public purpose of the kind which would justify the condemnation of the land of particular citizens, and that the use of eminent domain for that purpose was a denial of the equal protection of the laws and a deprivation of property without due process of law.

There seems, however, to be nothing in the utterances of the Supreme Court thus far which would preclude its adopting the view that the effective replotting of remnants of land otherwise unusable and the adequate protection of the beauty, health and usefulness of improvements admittedly public in character are objects so important to the community welfare as to render the use of excess condemnation for those purposes a justifiable exercise of the right of eminent domain.

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In studying excess condemnation one enters a field of research in which there is almost no isolated literature. The sources from which this study has been wrought out do not constitute an imposing array of definitely relevant titles. They comprise, rather, a very numerous list of paragraphs, pages or chapters which have been extracted from books, articles, reports and documents bearing upon a wide range of topics and which are, in themselves, of little general informational value. It has been deemed worth while to gather together into a bibliography only the sources which have definite independent value for those seeking general information upon the problem of excess condemnation and to indicate merely the types of sources, periodicals, reports and proceedings in which fugitive data regarding specific projects of excess condemnation sometimes appear.

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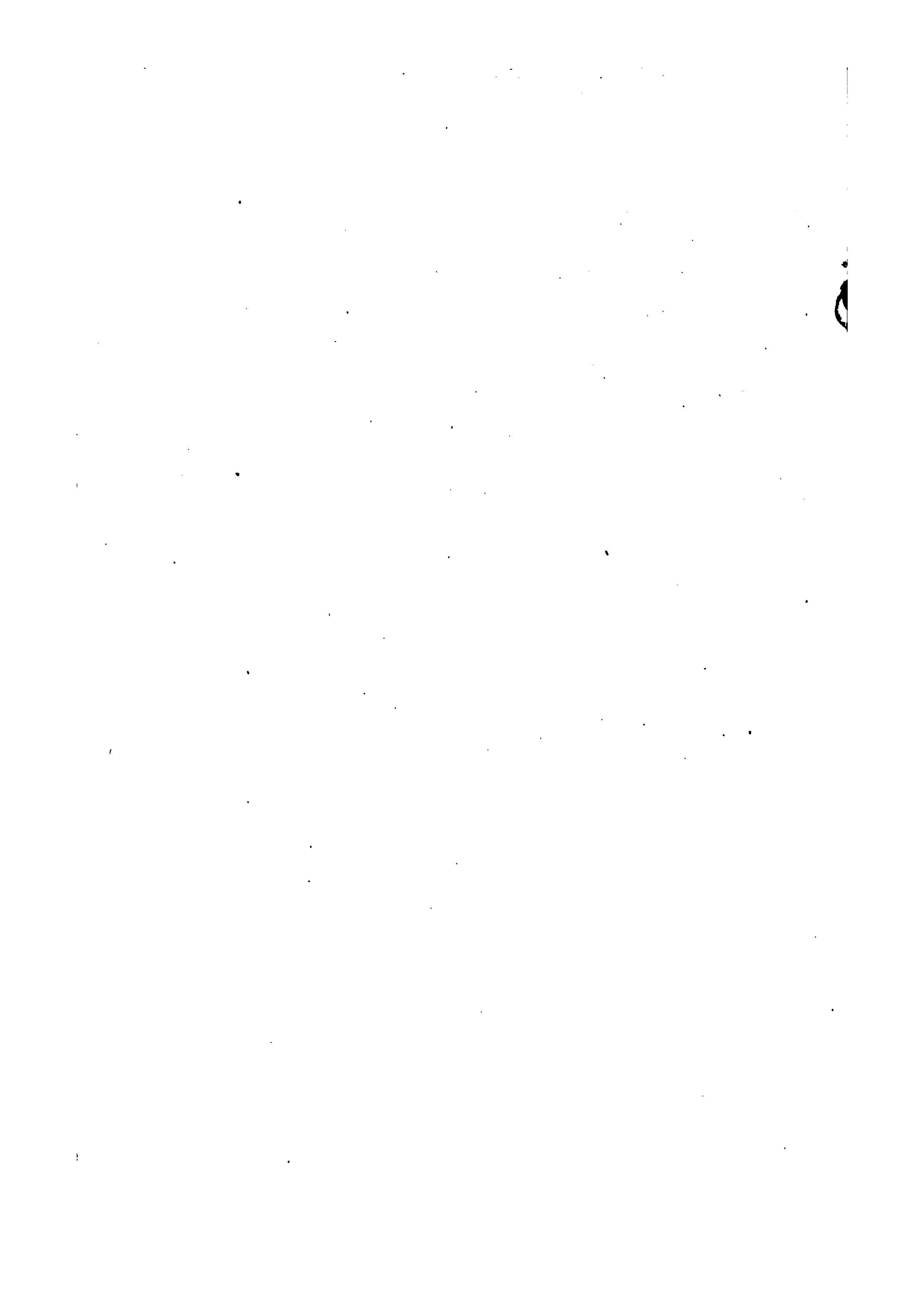

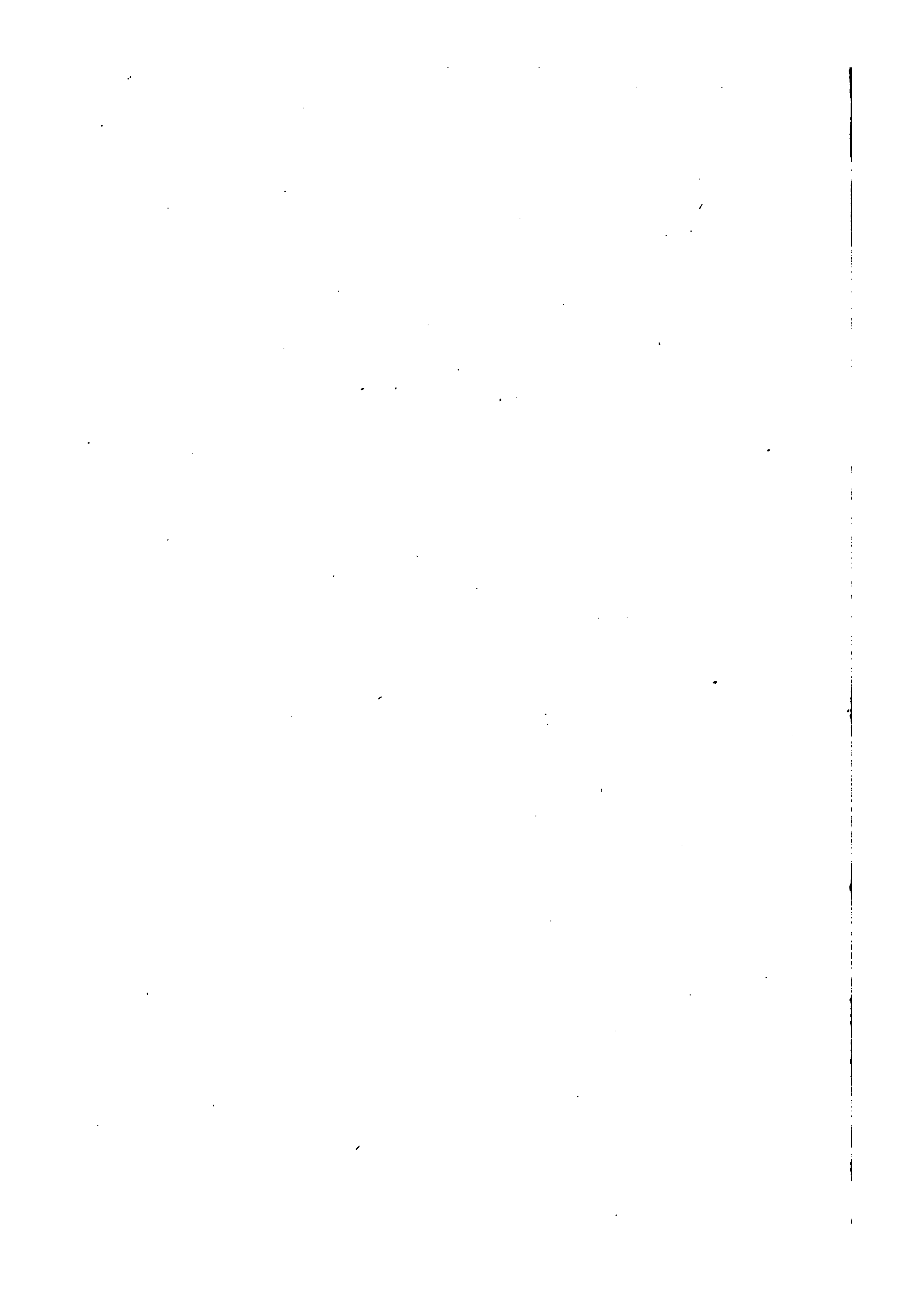

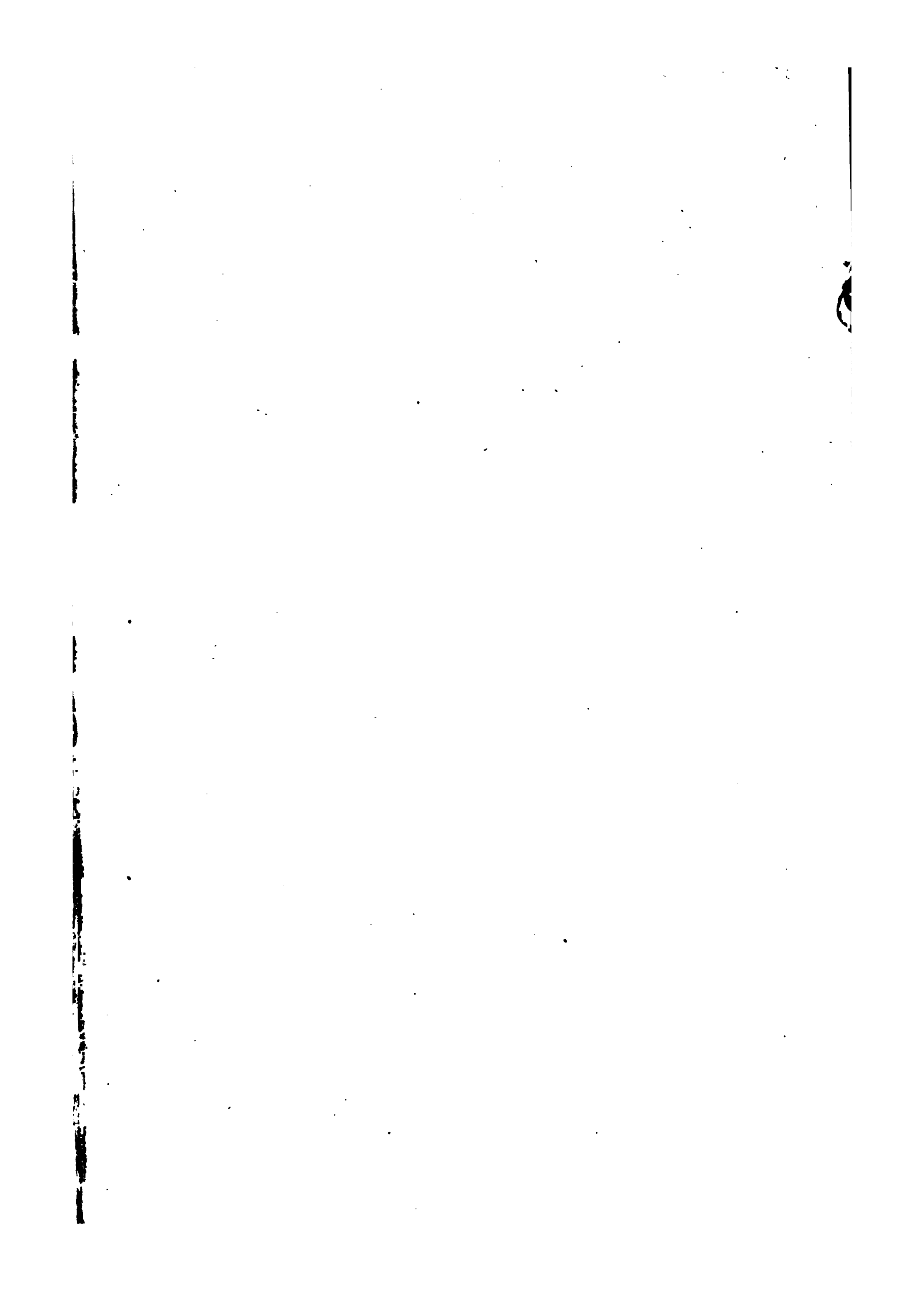

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